TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 325.

JOHN HALSTEAD, PLAINTIFF IN ERROR,

vs.

SARAH A. BUSTER AND MARY A. McGEE (LATE MARY A. BUSTER).

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR DISTRICT OF WEST VIRGINIA.

FILED FEBRUARY 6, 1888.

stands as to this matter in exactly the same position as the administrator of an estate. His powers do not extend beyond the State of his appointment. The receiver of a court of the State of New York has no power to bind the receiver of a court of the State of New Jersey. Each is supreme within the jurisdiction which appoints him, but powerless beyond that jurisdiction. *Chapman* v. *Fish*, 6 Hill, 554. The following cases are in point:

Pond v. *Makepeace*, 2 Met. 116.
Aspden v. *Nixon*, 4 How. 467.
Stacy v. *Masher*, 6 How. 60.
McLean v. *Meek*, 18 How. 16.

And these cases hold that the judgment is not even *prima facie* evidence of the debt.

I close, with the following extract from the case of *Downs* v. *Fuller*, in 2 Met. 135: "That a void judgment may be impeached by plea and proof, is very clear. It is generally true, no doubt, that an erroneous judgment is to be avoided only by writ of error; but this rule of law does not apply to cases where a party has a right to impeach a judgment and yet has no right to reverse it by writ of error." Robert Stockton could not sue out a writ of error in New York. (*Chapman* v. *Fish*, *supra*.)

FREDERIC W. STEVENS,
Of Counsel with Defendant in Error.

MARCH, 1891.

140-273
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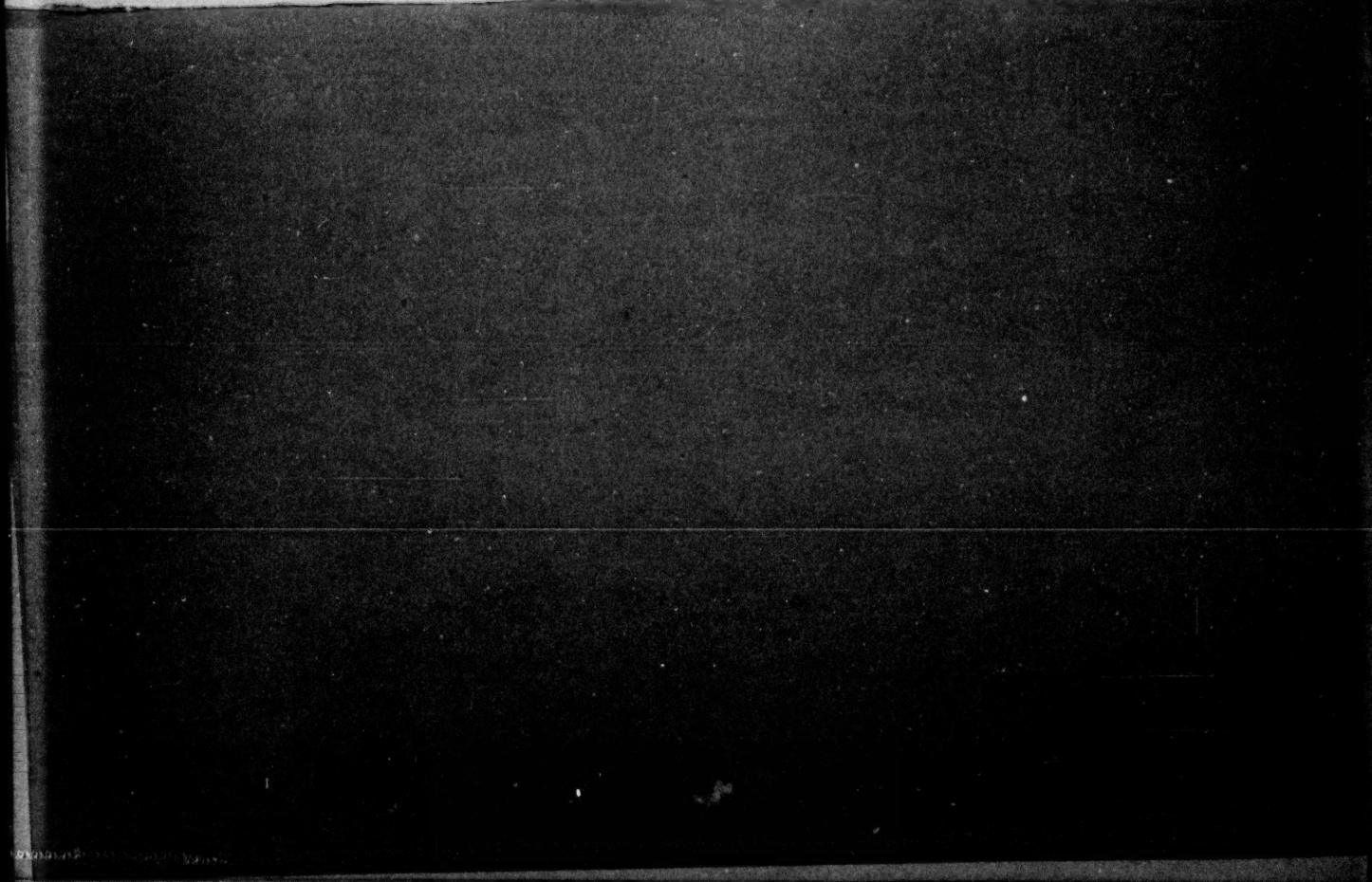

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1 Pleas held before the Honorable John J. Jackson, judge of the district court of the United States for the district of West Virginia, at Charleston, on Wednesday, November 30th, 1887, and in the 112th year of the Independence of the United States of America.

Be it remembered that heretofore, to wit, at rules held in the clerk's office of said court, at Charleston, on the first Monday in August, 1873, came John Halstead, a citizen and inhabitant of the State of New York, by Abraham Burlew, Esq., his counsel, and filed his declaration in ejectment (together with the notice thereto attached and the marshal's return thereon) and specification of damages against William B. Buster and Eldridge Barrett, which declaration, specification, notice, and marshal's return are in the words and figures following, to wit:

Declaration.

In the District Court of the United States for the District of West Virginia, Holden at Charleston, in said State.

2 John Halsted, a citizen of the city of New York and of the State of New York, complains of William B. Buster and Eldridge Barrett, citizens of the State of West Virginia, for that heretofore, to wit, on the first day of February, 1873, the said plaintiff was possessed in fee of a certain tract or parcel of land lying and being in the county of Fayette and State of West Virginia, which land was conveyed by Robert Soulter, trustee, to John Halstead on the 6th of June, 1864, but which land is more particularly described in a deed from William K. Smith and Anderson G. Grinnan to the Forest Hill Mining and Manufacturing Company, dated on the 15th day of June, 1867, as follows, to wit:

Beginning at a point marked "A" in the middle of the northern line of the old Forest Hill tract, thence N. 23° W. 193 poles to two chestnut oaks on a ridge between Armstrong and Morris creeks and corner to the lands of Paint Creek Company; thence along the top of the ridge S. 87° W. 40 poles to two chestnuts, S. 59° W. 42 poles to a tall white oak, S. 32° W. 54 poles to a chestnut, S. 12 W.
3 61 poles to a black oak, S. 60° W. 32 poles to a white oak, S. 26° W. 34 poles to two chestnut oaks, S. 48° W. 23½ poles to a ches-nut, S. 64° W. 53 poles to a dogwood, S. 11° W. 26 poles to a white oak, S. 61° W. 106 poles to a gum, S. 10° W. 18 poles to a chestnut, S. 44° W. 21½ poles to a stake, S. 57° W. 45 poles to a hickory, S. 45° W. 26 poles to a small locust, S. 15° W. 24 poles to a chestnut oak, S. 42 poles to a chestnut oak, S. 28° E. 90 poles to a black oak, S. 84° W. 18 poles to a stake, S. 60 W. 41 poles to a chestnut, S. 66° W. 44 poles to a black oak, N. 83° W. 36 poles to a chestnut, S. 43° W. 82 poles N. 87° W. 28 poles to three chestnuts, N. 82° W. 60 poles to a black oak, S. 50 W. 20 poles to a white oak, S. 12° W. 20 poles to a stake, S. 5° W. 41 poles to a white oak, N. 86° W.

32½ poles to a chestnut, S. 35 W. 59 poles to a chestnut oak at the head of Morris creek; thence along the ridge between Paint and Armstrong creeks S. 30° W. 69 poles to a chestnut, S. 55 E. 24 poles to a chestnut oak, N. 80 E. 25 poles to two chestnut oaks, S. 65 E. 25 poles to a pine, N. 80° E. 56 poles to a white oak, S. 16° E. 102 poles to a chestnut oak, S. 20° W. 48 poles to a chestnut, S. 45° W. 80 poles to a chestnut, S. 33° E. 32 poles to a chestnut oak, S. 20°
4 W. 77 poles to a chestnut oak and pine, S. 16° E. 50 poles to a chestnut, S. 5° W. 47 poles to a chestnut oak at the head of Ash Camp branch, S. 50° E. 66 poles to a chestnut oak, N. 67′ E. 24 poles to a chestnut, S. 87° E. 24 poles to a chestnut, S. 67° E. 24 poles to a chestnut, S. 2′ W. 34½ poles to a chestnut oak, S. 14° W. 44 poles, S. 23° E. 41 poles to a chestnut, N. 84° E. 185 poles; thence N. 6° W. 450 poles; thence N. 31° E. 900 poles to the beginning; also a certain parcel of land bounded on the south by the foregoing boundary, on the north by the Great Kanawha river, being the westerly part of the Huddleston survey, by a line running from the northerly to the southerly side of the same, containing about one hundred acres, being a part of the tract known as the Huddleston tract.

And, being possessed of the whole of the foregoing-described land, the defendants afterwards, to wit, on the 10th day of February, 1873, entered into said premises and unlawfully withheld from said plaintiff the possession thereof, to his damage of $5,000.00.

JOHN HALSTEAD,
By A. BURLEW, *His Att'y.*

5 *Notice.*

To William B. Buster and Eldridge Barrett, defendants in the foregoing suit:

Take notice that the above declaration in ejectment against you and specification of damages will be filed in the office of the clerk of the district court of the United States for the district of West Virginia, holden at Charleston, at rules, on Monday, the 4th day of August, 1873, at which time and place you can appear if you think proper, and that if you fail to appear and plead thereto within the time required by law judgment will be given against you.

JOHN HALSTEAD,
By A. BURLEW, *Att'y.*

June, 1873.

Specification.

William B. Buster & Eldridge Barrett Dr. to John Halstead.

To damages for destruction of property described in plaintiff's declaration as follows:

To one thousand trees, at $2 per tree	$2,000 00
To damages to land	2,000 00
	$4,000 00

6 The plaintiff, John Halstead, will claim damages as above stated on the trial of this cause.

JOHN HALSTEAD,
By A. BURLEW, *Att'y.*

Return.

Served within declaration, notice, and specification of damages on William B. Buster on this 29th day of July, 1873, by delivering to him a true copy of the same, and on Eldridge Barrett on this 29 day of July, 1873, by delivering to his mother, a free white person & member of his family & above the age of 16 years, at his usual place of abode, a true copy of the within, and explaining to her the purport thereof, the said Barrett not at home and not found.

WM. BROWN,
Deputy for H. Slack, Mar.

Whereupon, it appearing that the defendants, W. B. Buster and Eldridge Barrett, have been duly served with copies of the foregoing declaration, specification, and notice, and they failing to appear, on motion of the plaintiff it was ordered that judgment be en-
7 tered in favor of the plaintiff against the defendants for the premises described in the declaration, unless they should appear and plead to issue at the then next rules.

At which day, to wit, at rules held as aforesaid in said clerk's office, on the first Monday in September, 1873, came again the plaintiff, by his said attorney, and on his motion, and the defendant- still failing to appear, it was ordered that the order made at the last rules in this cause be confirmed.

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, December 24th, 1873.

This day came the parties, by their attorneys, and thereupon the defendants for plea say that they are not guilty of unlawfully withholding from the plaintiff the premises, as in the plaintiff's declaration it is alleged; to which plea the plaintiff replies generally and puts himself upon the country, and the defendants do the like, and on motion of the defendants the office judgment obtained at
8 rules is set aside, and by consent of the parties it is ordered that Surveyor A. P. Sinnett do go upon the lands in controversy in this action and do such surveying as either party may require, and that he return to this court five reports and seven fair plats; but before commencing such surveying the surveyor shall give to the parties or their attorneys reasonable notice of the time and place of commencing such surveying.

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, May 8, 1874.

This day came the parties, by their attorneys, and on motion of the plaintiff it is ordered that the surveyor, Abel P. Sinnett, do such

further and additional surveying on the land in controversy as either party may require, and report in accordance with the provisions of the order of survey heretofore entered in this cause, and on motion of the defendants it is ordered that the plaintiff give bond with good security for costs in this cause before the clerk of this court within 60 days from this date, and on his
9 failure so to do this cause shall be dismissed.

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, November 24, 1876.

This day came the parties, by their attorneys, and on motion of the defendants and at their costs this cause is continued until the next term; and Samuel Estep, a witness duly summoned in this cause at this term on behalf of the plaintiff, being called and not appearing, on motion of plaintiff a rule is awarded against said witness, returnable here on the 2d day of the next term, to answer for his said contempt.

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, November 6, 1878.

This day came the parties, by their attorneys, and thereupon the death of the defendant Wm. B. Buster is suggested upon the record, and by consent of the parties this cause is revived in the
10 name of Mary A. Buster and Sarah A. Buster, heirs-at-law of said Wm. B. Buster, dec'd, to — proceeded in against them to final determination, and this cause is continued.

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, June 7, 1879.

For reasons appearing to the court, this cause is set for trial on the 9th day of the next term, to which time this cause is continued.

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, November 16, 1881.

On motion of the plaintiff, by his attorney, T. S. Robson is hereby appointed assistant surveyor in this cause to act with A. P. Sinnett, heretofore appointed, and they are hereby directed to do such further surveying in this cause as either party may require and report the same to court, with maps, first giving ten days' previous notice to counsel of record in this suit before beginning said survey.

11 And said surveyors are ordered and directed to lay down on the maps already filed in this cause the entire Wilson and Gallatin surveys, under which the respective parties claim to hold.

And this cause is continued at the costs of the plaintiff.

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, May 8th, 1882.

The defendants, Sarah A. Buster, Mary A. McGee, formerly Mary A. Buster, disclaim title to all the lands in the plaintiff's declaration mentioned and described, except the following parcel, to wit: Beginning at the point marked "B," on the plat marked X, and filed in this cause by A. P. Sinnett, surveyor, thence with the blue line to the point "D;" thence with the red line to the point "J," on the top of the ridge between the waters of Armstrong creek and Morris creek, a poplar tree standing at said point, the said point being on the outer line of the Gallatin 2,000 acres; thence with the top of said ridge towards the Kanawha river to the point "P;"
12 thence with the red line to 13; thence by the blue line to the place of beginning, at the point "B."

And at the same day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, the day and year last aforementioned.

This day came the parties, by their attorneys, and thereupon came a jury, to wit, John N. Conley, A. W. Mann, Jacob Fry, Geo. E. Sampson, George A. Stephenson, J. M. McWhorter, James T. Rucker, Reuben Harrison, John H. Atkinson, John T. Gibson, Shryner Stover, and Gloud W. Kennedy, who being selected by lot, tried, and sworn the truth to speak upon the issue joined, and having partly heard the evidence, and there not being time to finish the trial of this cause this day, the jury are adjourned over until to-morrow morning at 9 o'clock.

And at another day of the same term, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, May 9, 1882.

This day came the parties, by their attorneys, and the jury
13 impaneled in this cause at a former day of the term appeared pursuant to their adjournment, and having heard the evidence, and there not being time to finish the trial of this cause this day, the jury are adjourned over until to-morrow morning at nine o'clock.

And at another day of the same term, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, May 10th, 1882.

This day came the parties, by their attorneys, and, on motion of the plaintiff, it is ordered that this cause be dismissed as to the defendant Eldridge Barrett; and thereupon the jury impaneled and sworn in this cause appeared in court according to their adjournment on yesterday, and, having fully heard the evidence and arguments of counsel, retired to their chamber to consider of their verdict, and after some time returned into court and upon their oaths do say, "We, the jury, find for the defendants." Therefore it is considered by the court that the defendants be discharged
14 and go hence without day, and that the plaintiff be in mercy, &c., and that the defendants recover against the plaintiff their costs by them about their defense in this behalf expended.

And at another day of the same term, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, May 20, 1882.

This day came again the parties, by their attorneys; and it appearing that the judgment entered on the verdict rendered in this cause at a former day of this term having been so entered without the direction of the court thereto, the said judgment is set aside and held for naught; and thereupon the plaintiff, by his attorney, moved the court to set aside the verdict of the jury returned in this cause at this term and grant him a new trial herein, of which motion the court takes time to consider, and this cause is continued until the next term.

And at another day, to wit, at a district court of the
15 United States for the district of West Virginia, held at Charleston, May 30, 1883.

This day came again the parties, by their attorneys, and the motion heretofore made by the plaintiff to set aside the verdict of the jury rendered herein and to award him a new trial, being argued and considered by the court, is overruled.

It is therefore considered by the court that the defendants be discharged and go hence without day, and that the plaintiff be in mercy, &c., and that the defendants recover against the plaintiff their costs by them in this behalf expended, including in said costs the sum of $10, the fee of D. C. Gallaher, Esqr., who, at the instance and by the direction of the court, recorded certain testimony given in court upon the motion aforesaid.

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, on the 24th May, 1877.

This day came the plaintiffs, by *their* attorney, and here
16 presented to the court the mandate of the Supreme Court of the United States in the above-entitled cause, and, on his motion, it is ordered that said mandate, which is in the words and figures following, to wit, be here entered of record:

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judge of the district court of the United States for the district of West Virginia, Greeting:

Whereas, lately, in the district court of the United States for the district of West Virginia, before you, in a cause between John Halsted, plaintiff, and Sarah A. Buster and Mary A. McGee (late Mary A. Buster), defendants, wherein the judgment of the said district court, entered in said cause on the 30th day of May, A. D. 1883, is in the following words, viz:

"This day came again the parties, by their attorneys, and the motion heretofore made by the plaintiff to set aside the verdict of the jury rendered herein and to award him a new trial, being argued

and considered by the court, is overruled. It is therefore con-
17 sidered by the court that the defendants be discharged and go hence without day, and that the plaintiff be in mercy, &c., and that the defendants recover against the plaintiff their costs by them in this behalf expended, including in said costs the sum of $10, the fee of D. C. Gallaher, Esqr., who, at the instance and by the direction of the court, recorded certain testimony given in court upon the motion aforesaid," as by the inspection of the transcript of the record of the said district court, which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and eighty-six, the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel, on consideration whereof it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the
18 same is hereby, reversed, costs in this court to be paid by the plaintiff in error, and that this cause be, and the same is hereby, remanded to the said district court for further proceedings.

DECEMBER 13, 1886.

You therefore are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the ninth day of May, in the year of our Lord one thousand eight hundred and eighty-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Costs:

Clerk---------- ——
Printing record---------- ——

Paid by pl'ff in error.

And at the same day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, the day and year last aforementioned.

19 This day came the plaintiff, by his attorney, and on his motion he has leave, with the assent of the said defendants, to amend his declaration at bar by inserting therein the citizenship of the said defendants at the time of the commencement of said action; whereupon the amendment was accordingly made in said declaration by inserting after the words "complains of William B. Buster and Eldridge Barrett" the following, to wit, "citizens of the State of West Virginia," so as to make the introductory part of said declaration, read as follows, to wit: John Halsted, a citizen of the

city and State of New York, complains of William B. Buster and Eldridge Barrett, citizens of the State of West Virginia, for that heretofore, to wit, &c.

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, November 21 1887.

This day came the defendants, Sarah A. Buster and Mary A. McGee, as well as the plaintiff, by their attorneys, and thereupon the said defendants tendered a disclaimer in writing as to a portion of the lands set out and described in the plaintiff's declaration, which is here filed; and as to the residue of said land the said defendants for plea say that they are not guilty of unlawfully withholding from the plaintiff the same, as in the plaintiff's declaration it is alleged, to which *the* plea the plaintiff replies generally and puts himself upon the country, and the defendants do the like; and thereupon came a jury, to wit, A. W. Rollins, Robert C. Gustin, J. B. Peyton, Henry F. Goshorn, Evan Neely, Lemuel Jarrett, Richard Woodrum, William Ferguson, C. C. Guthrie, A. W. Warden, Wm. M. Reitz, and D. M. Pearson, all good and lawful men of this judicial district, who being duly sworn to well and truly try the issue in this cause, and having partly heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning at 9 o'clock.

The disclaimer referred to in the last foregoing order is in the words and figures following, to wit:

Disclaimer.

"JOHN HALSTEAD
vs.
SARAH A. BUSTER *et als.* } In Eject.

The defendants, Sarah A. Buster and Mary A. McGee, formerly, Mary A. Buster, disclaim title to all the lands in the plaintiff's declaration mentioned and described except the following parcel, to wit: Beginning at the point marked 'B' on the plat marked 'X' and filed in this cause by A. P. Sennett, surveyor, thence with the blue line to the point 'D;' thence with the red line to the point 'J,' the same being on the top of the ridge between the waters of Armstrong creek and Morris creek, a poplar tree standing at said point, the said point being also on the outer line of the Gallitin 2,000 acres; thence with the top of said ridge towards the Kanawha river to the point marked 'P;' thence with the red line to the intersection of said red line with said blue line at the point marked '13;' thence with the blue line to the place of beginning at 'B.'

SARAH A. BUSTER &
MARY A. McGEE,
By Her Attorneys."

W. MOLLOHAN,
J. F. BROWN, *Att'ys.*

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, November 22, 1887.

This day came the parties, by their att'ys, and the jury impanelled and sworn in this cause appeared in court according to their adjournment on yesterday and, having fully heard the evidence and arguments of counsel, retired to their chamber to consider of their verdict, and after some time returned into court and upon their oaths do say: "We, the jury, find for the defendants." And thereupon the plaintiff moved the court to set aside the verdict of the jury in this cause and grant him a new trial herein; and the matters of law arising upon said motion being argued by counsel,
23 it is considered by the court that said motion be overruled. Therefore it is considered by the court that the plaintiff take nothing by his declaration aforesaid, but for his false clamor be in mercy, &c., and that the defendants recover against the said plaintiffs their costs by them about their defense in this behalf expended.

MEMO.—Upon the trial of this cause the plaintiff, by his att'y, excepted to certain rulings of the court given herein and tendered his bill of exceptions marked No. 1, which is here signed and sealed by the court and ordered to be made a part of the record in this cause.

Bill of exceptions marked No. 1 is in the words and figures following, to wit:

"Be it remembered that on the trial of this action before the jury the plaintiff, to maintain the issue on his part, read in evidence a copy of a survey and accompanying plat made April 14, 1795, for William Wilson of 85,600 acres of land in the words and figures
24 following, to wit: Surveyed for William Wilson eighty-five thousand six hundred acres of land in Kanawha county, on S. W. side of the Great Kanawa river, joining surveys made for Albert Gallatin & Co. at and near the Great Falls of said river, extending down back of and with said surveys so as to include some of the waters of Cabin creek, by virtue of the following land office treasury warrants, viz., 4 warrants of 20,000 acres each, Nos. 782, 783, 784, 785, and 5,600 acres of a warrant for 20,000, N-. 791, all dated the 14th Oct., 1794, and is bounded as followeth, viz: Beginning at two beech trees in the forks of a branch running into Cabin creek about ¼ of a mile below Flin's cabin, and running thence S. 55° E. 350 poles to a poplar and red oak on the top of a ridge; thence S. 65° E. 286 poles, crossing a branch at 80 poles, to 2 gums on the east side of a hill; thence S. 85° E. 1,760 poles to two chestnut trees growing from one root, crossing waters at the following distances from each other, at 120 poles, Paint creek; at 400 poles, a branch; 440 po's, at 500 poles, at 260 poles, s'd 2 chestnuts; thence S. 24° E. 732 poles to a beech in the forks of Armstrong's
25 creek about 6 poles from the left-hand fork of the same, being corner to Albert Gallatin's survey of 2,000 acres, crossing water at 360 poles; thence S. 66° E. 1,366 poles, crossing Loop

creek, to a hickory on a hillside, corner to said Gallatin survey of 3,000 acres; thence with a line of the same N. 74° 30′ east 798 poles to a gum & maple in the forks of a branch, corner to the same; thence, leaving said survey and running east 724 poles, to 2 Spanish oaks about 40 poles from the Great Kanawha river, crossing water at 420 poles; thence south 15° west 504 poles to a poplar and maple in a flat, crossing water at 220 poles; thence S. 50° W. 152 poles to a Spanish oak & dogwood on the point of a ridge, crossing water at 20 poles; thence S. 20 W. 432 poles to two chestnut oaks on the top of a ridge, crossing waters at the following distance, 120 poles; thence S. 10 E. 560 poles to two white oaks on the point of a ridge, crossing waters at the following distances, at 140 poles, 180 poles, & 200 poles, waters of Laurel creek; thence S. 40° W. 2,020 poles to a poplar and maple in a hollow about 20 poles from a branch
26 of Paint creek, crossing waters at the following distances, 160 poles, 140 poles, 100 poles, 160 po's, 360 poles, 660 poles to Loop creek, 360 poles and 600 poles to the said maple and poplar; thence N. 70° W. 4,548 poles to a beech and sugar tree on the bank of Raccoon creek, a branch of Cabin creek, crossing waters at the following distances, 400 poles, 320 poles, 240 poles, 320 poles, 1,040 poles, 100 poles to Paint creek, 420 poles, 500 poles, waters of Paint creek, 720 poles to Cabin creek, 488 poles to the s'd beech & sugar tree; thence N. 9° 30′ E. 2,980 poles to the beginning, crossing waters at 340 poles, 300 poles, 240 poles, 200 poles, 300 poles, 540 poles, 100 poles, 500 po's, 460 poles to the said beginning, including 6,786 acres of prior claims for which there is an allowance made in the calculation 14th Ap'l, 1794.

AND'W JOHNSTON, *Ass't.*
REUBEN SLAUGHTER, *S. K. C.*

A copy.
Teste: JOEL S. QUARRIER,
Cl'k Kanawha County C't.

I, Thomas Swinburn, deputy for S. Chapman, surveyor of Kanawha county, West Virginia, hereby certify that the date of
27 the above survey, as recorded in the original surveyor's book of Kanawha county, No. 1, in my office, is April 14, 1795.
Given under my hand this 9th May, 1882.

THOMAS SWINBURN,
Deputy for S. Chapman, S. K. C.

(Here follows diagram marked p. 27.)

Also a copy of a grant from the Commonwealth of Virginia to Benjamin Martin, assignee of William Wilson, for 85,600 acres of land, dated 1st January, 1796, in the words and figures following, to wit:

Robert Brooke, Esquire, Governor of the Commonwealth of Virginia, to all to whom these presents shall come, Greeting:

Know ye that by virtue of land office treasury warrants No. 782,

783, 784, 785, and 791, issued the 14th day of October, 1794, there is granted by the said Commonwealth unto Benjamin Martin, assignee of William Wilson, a certain tract or parcel of land, containing eighty-five thousand six hundred acres by survey bearing date the 14th day of April, 1795, lying and being in the county of
28 Kanawha, on the southwest side of the Great Kanawha river, joining surveys made for Albert Gallatin at and near the Great Falls of said river and extending down back of and with the said surveys so as to include some of the waters of Cabin creek, and is bounded as followeth, to wit: Beginning at two beech trees in the fork of a branch running into Cabin creek about a quarter of mile below Flin's cabin, and running thence S. 55° E. 350 poles to a poplar and red oak on the top of a ridge; thence S. 65° E. 286 poles, crossing a branch at 80 poles, to two gums on east side of a hill; thence S. 80° E. 1,760 poles to two chestnut trees growing from one root, crossing waters at the following distances from each other, to wit, at 120 poles, Paint creek; 400 poles, a branch; at 440 poles, 500 poles, 260 poles to the two chestnuts; thence S. 24° E. 732 poles to a beech in forks of Armstrong's creek about six poles from the left-hand fork, the same being corner to Albert Gallatin's survey of 2,000 acres, crossing water at three hundred and sixty poles; thence S. 66° E. 1,366 poles. crossing Loop creek, to a hickory on a hillside, corner to
29 said Galentine's survey of 3,000 acres; thence with a line of the same N. 74½° E. 798 poles to a gum & maple in the forks of a branch, corner to the same; thence, leaving said survey and running east 724 poles, to two Spanish oaks about 40 poles from the Great Kanawha river, crossing waters at 420 poles; thence S. 15° W. 504 poles to a poplar and maple in a flat. crossing waters at 220 poles; thence S. 50° W. 152 poles to a Spanish oak and dogwood on the point of a ridge, crossing waters at 20 poles; thence S. 20° W. 432 poles to two chestnut oaks on the top of a ridge, crossing waters at the following distance, 120 poles; thence S. 10° E. 560 poles to two white oaks on the point of a ridge, crossing waters at the following distance-, 140 poles, 180 poles, and 200 poles, waters of Laurel creek; thence S. 40° W. 2,020 poles to a poplar and maple in a hollow about 20 poles from a branch of Paint creek, crossing waters at the following distance-, 160 poles, 140 poles, 100 poles, 160 poles, 360 poles, 660 poles to Loop creek. 360 poles and 600 poles to the said maple and poplar; thence N. 70° W. 4,548 poles to a beech and sugar tree on the bank of Raccoon creek, a branch of Cabin
30 creek, crossing waters at the following distance-, 400 poles, 320 poles, 240 poles, 320 poles, 1,040 poles, 100 poles to Paint creek, 420 poles, 500 poles, waters of Paint creek, 720 poles to Cabin creek, 488 poles to the said beech and sugar tree; thence N. 9° & 30′ E. 2,980 poles to the beginning, crossing waters at 340 poles, 300 poles, 240 poles, 200 poles, 300 poles, 540 poles, 100 poles, 500 poles, 460 poles to the said beginning; but it is always to be understood that the survey upon which this grant is founded includes 6,786 acres of prior claims (exclusive of the above quantity of 85,600 acres), which having a preference by law to the warrants and rights upon which the grant is founded, liberty is reserved that the

same shall be firm and valid and may be carried into grant or grants, and this grant shall be no bar in either law or equity to the confirmation of the title or titles to the same, as before mentioned and reserved, with its appurtenances; to have and to hold the said tract or parcel of land, with its appurtenances, to the said Benjamin Martin (except as before excepted) and his heirs forever.

31 In witness whereof the said Robert Brooke, Esquire, Governor of the Commonwealth of Virginia, hath hereunto set his hand and caused the lesser seal of the said Commonwealth to be affixed, at Richmond, on the first day of January, in the year of our Lord one thousand seven hundred and ninety-six, and of the Commonwealth the twentieth.

ROBERT BROOKE.

LAND OFFICE, RICHMOND, VA.

The foregoing is a true copy from the records.
Witness my hand and seal of office this 23d day of August, 1875.

S. H. BOYKIN,
[L. S.] *Reg. L. Office.*

Also sundry deeds and wills, beginning with a deed from Benjamin Martin which transferred, conveyed, and devised to the plaintiff all the title acquired by Martin under his said grant in and to the land described in his declaration in this cause.

Also an agreement in writing signed by Mollohan and
32 Fountain, att'ys for defendant, and A. Burlew, att'y for plaintiff, endorsed "agreement made concerning certain maps," &c., in the words and figures following, to wit:

JOHN HALSTEAD
vs.
HEIRS OF WILLIAM B. BUSTER, Dec'd. } In Ejectment.

It is agreed between the plaintiff and defendants to the above-entitled action of ejectment now pending in the United States district court at Charleston, West Virginia, that on the trial thereof no evidence need be introduced by either party of the identity of the Wm. Wilson survey of 85,600 acres or of the Gallatin and Savary survey of 2,000 acres, but the courses and distances thereof shall be assumed to be correctly laid down by A. P. Sinnett on the maps and plats filed by him in said cause, marked 1, 2, 3, &c., under an order made in said cause at the last term of said court. This agreement is not, however, to preclude either party from raising and insisting on any matters of law by virtue whereof the courses and dis-
33 tances of said surveys or either of them may be required to yield to any other calls mentioned in said surveys respectively, and we accept the said plats in lieu of extending the said surveys upon the plats made and heretofore filed by Surveyor Sinnett in this cause, as required by the order made in this cause on the 16th day of November, 1881.

MOLLOHAN & FONTAINE,
Att'ys for Defendants.
A. BURLEW, *Att'y for Plaintiff.*

Also the report and plat of survey made and filed in this action by A. P. Sinnett, surveyor, under an order made in this action on the — day of ——, 18—, which report is in the words and figures following, to wit, No. 1, &c.:

In the District Court of the United States for the District of West Virginia. In Ejectment.

JOHN HALSTEAD
vs.
WM. B. BUSTER & ELRIDGE BARRETT.

In obedience to an order of said court, made at the fall term
34 thereof, at Charleston, West Va., in the above-named cause, a copy of which said order attends this report and made Exhibit No. 1 (see page — of this record for said Exhibit No. 1), the undersigned, special surveyor for said court, did, on the 24th day of March, 1874, after having given notice to the parties of the time and place of commencing said survey, a copy of which notice attends this report and made Exhibit No. 2, at the instance of the plaintiff's counsel proceed to execute said order. I went to the house of James R. Buster and from thence to a beech tree on Armstrong's creek, about 85 poles above the first forks and designated by letter A on the accompanying plat and claimed by the plaintiff as a corner to a survey of 85,600 acres made for Wm. Wilson and corner to a survey of 2,000 acres made for Albert Gallatin and Savary De Valcolon. Present, James R. Buster, Dr. Chas. F. Hale, A. Burlew, counsel for plaintiff, and W. Mollohan, counsel for the defendants, with R. E. Wescott and Willis Sinnett as my chainmen. At the instance of the plaintiff's counsel I run thence S. 41 E. 3 poles & 16 links to the bank of Armstrong's
35 creek, the spot shown to me by James R. Buster as the place where the original beech once stood. I then run the call of the Wilson line reversed, with a variation of 2° east, N. 22′ W., crossing the Tucker fork of Armstrong's at 120 poles (course continued), in all 167 poles, and found 2 poles to my left (at B) two black oaks and a birch marked with three chops on three sides, viz., on the side S. 22° E., on the side about N. 22 W., and on the side facing S. 31 W., and claimed to be corner between the Forrest Hill and the Elk Ridge tracts (same course, N. 22° W., continued), in all 327 poles, to two chestnut oaks on the top of the dividing ridge between Armstrong and the Skylar fork of Morris creek (at C) and corner to Forrest Hill tract. I then, at the instance of A. Burlew, counsel, &c., began at the two black oaks and birch (at B) and ran thence S. 31 W. 42 poles to Tucker fork (course continued), in all 77 poles, to the intersection of said line with the Gallatin line (at D). I then began on said line where it crosses Tucker fork and
36 run thence up said *said* fork S. 89 W. 58 poles to the improvement of Barrett, on the S. E. side of said branch, in all 78 poles, to Barrett's house (at E). The plaintiff's counsel not requesting any further surveying done, I stopped surveying on the part of the plaintiff at this point.

MARCH 25, 1874.

At the instance of the defendants, Buster and others, I began at the beech (at A) and run for the reverse of the last course of the Gallatin and Savary 2,000 acres N. 449½ W. 125 poles to the line of the Forest Hill tract (at D), course continued, crossing Tucker fork at 178 poles, just below Barrett's house, in all, from said beech, 342 poles, to a poplar and two chestnut oaks on the top of the dividing ridge (at J); thence following along on the top of said ridge, as shown upon the plat, to the top of the rocky ledge on point ridge (at K); thence down said point ridge to a fallen walnut on Armstrong's creek (at L). The defendants not wanting any further surveying done, I stopped the survey upon the part of the defence at this point.

37 At the request of the plaintiff's counsel I went to the beech at (A) and ran the second call of a patent to J. R. Buster for 97 acres; thence N. to 6 W. I ran it with 30′ variation to the right N. 5½ W., crossing Tucker fork at 92 poles—course continued—in all 224 poles, for a white oak and gum; the distance terminated on the southeast hillside facing main Armstrong's creek at (M) (corner not found). I found no marks upon this line at the termination of the distance, and about 2 poles to my right stand two white oaks. One of said oaks has three chops of an axe on the side facing about west. One of said chops is about 2½ feet from the ground; the other two are about three inches from each other and 12 or 14 inches above the first. I did not block this tree. The marks are too young for the Buster survey, say not more *more* than 10 or 12 years old. There has been oak timber—several trees—cut and taken away for timber, as I suppose, in the immediate vicinity of the termination of this line. I then run the 3d call of said patent S. 47½ W., cross-

38 ing the head of Log hollow and over a point and crossing the Wilson line at 72 poles, and crossing the head of a hollow of Tucker's fork, in all 92 poles, for two chestnut oaks and white walnut. The distance terminated on a point ridge facing Tucker's fork at (N) (corner not found). No marks found upon this line. I then run for the 4th call of patent S. 8½ W. 42 poles for a poplar and birch; distance terminated on a hillside near the Tucker's fork at (O). I did not find this corner or any marks upon this line. I then *then* run for the last call of the patent S. 7½ E., crossing Tucker's fork at 14 poles, and stopped surveying.

Pursuant to notice given, at the request of plaintiff's counsel, I went on the 6th of August, 1874—I went to the house of James R. Buster, on Armstrong's creek, and, being informed that Dr. Chas. F. Hale was absent from home, I adjourned the survey until August the 11th. Tuesday, 11th August, 1874, pursuant to adjournment I went to the beech tree at (A) on Armstrong's creek, corner to Wilson, Gallatin, and Buster. Present, J. R. Buster, Wm. D. Buster, Dr. Chas. F. Hale, David Mahood, and —— Anderson. In accordance with instructions

39 of plaintiff's counsel and also of Dr. C. F. Hale, with said Mahood and Anderson as my chainmen, I ran the second call of a patent to Jas. R. Buster for 97 acres. I ran it with a variation

of 30′ east, thence N. 5½ W., crossing Tucker fork at 92 poles, course continued, in all 224 poles, for a white oak and gum. The distance terminated on a southeast hillside facing main Armstrong's creek at (M), corner not found. I hunted for marks and could find no marks as corner or line trees. There has been timber cut about the termination of this line. I then run the 3d call of patent S. 47½ W. 92 poles for two chestnuts, oaks, and white walnut. The distance gave out on a point ridge at (N), facing the Tucker fork. I found no marks upon this line and found no marks as corner trees at or near the point (N). There is chestnut-oak timber near the termination of this line, but I found — upon it. I then *I then* ran the 4th call of patent S. 8½ W. 42 poles for a poplar and birch. The course
40 and distance terminated on a hill near Tucker fork at (O), corner not found, and no marks found upon this line. I then ran the last call of patent S. 7½ E., crossing Tucker fork at 14 poles, course continued by protraction, in all 150 poles, to (I), thence N. 65½ E. 80 poles to A, the place of beginning.

Remarks.

The lines on the accompanying plat shaded blue are intended to represent the lands claimed by the plaintiffs.

The lines represented by the letters A, J, P, Q, & to A, and shaded red, are intended to represent a tract of land claimed by William B. Buster.

The lines represented by the letters T, K, L, O, and to P, and shaded yellow, are intended to represent a tract of land claimed by James R. Buster.

The lines represented by letters A, M, N, O, I, & to A, and shaded green, are intended to represent a tract of 97 acres claimed by James R. Buster, and run according to the patent calls from the beech at A.

All of which is respectfully reported.

A. P. SINNETT,
Special Surveyor for Dist. C't U. S. for Dist. W. Va.

41 And said plat is endorsed "Exhibit B," in the words, letters, lines, and figures following, to wit:

(Here follows diagram marked p. 41.)

Also the plat filed in this action by A. P. Sinnett, surveyor, on the 24th of April, 1882, marked "plat No. 4," in the words and figures following, to wit:

(Here follows diagram marked p. 41*a*.)

And it was admitted by the respective parties in the presence of the jury that the exterior lines of the said William Wilson survey of 85,600 acres and the Gallatin and Savary survey of 2,000 acres hereinafter mentioned are correctly laid down on the said plat made

by A. P. Sinnett, marked "No. 4," and form an overlapping or interference with each other as there represented.

It was also admitted by the respective parties to this action in the presence of the jury that the lands claimed by the plaintiff and described in his declaration *and* represented and inscribed on
42 said map within the lines shaded blue as the "Forest Hill tract," and that said lands are correctly laid down on said map.

And it was admitted by the defendants in the presence of the jury that they were in possession of all the lands described in the declaration and claim title thereto, except that part thereof for which they have filed a written disclaimer in this action, which is in the words and figures following, to wit:

(For said disclaimer see page 11 of this record.)

And the plaintiff introduced evidence tending to prove that he and those under whom he claims have been in occupation of the lands described in the declaration by actual occupancy of the same since the year 1860.

It was also proved by the plaintiff that the beginning corner in the grant to Martin for the 85,600 acres is designated on the said map filed by A. P. Sinnett by the index pointing to the corner, marked "2 beeches."

That the fourth call in said grant for "two chestnut trees
43 growing from one root" is represented on the Martin line within the said Gallatin and Savary grant at "2 chestnuts," which were found and located on the ground, and that the call in the Martin grant "to a beech in the forks of Armstrong's creek," "corner to Albert Gallatin's survey of 2,000 acres," is represented on said map at the point "A."

The defendants, to maintain the issue on their part, read in evidence an entry dated the —, in the words and figures following, to wit:

(Entry not found on file in the papers.)

Also a copy of a survey for 2,000 acres made on the aforesaid entry, dated the 24th of August, 1794, in the words and figures following, to wit:

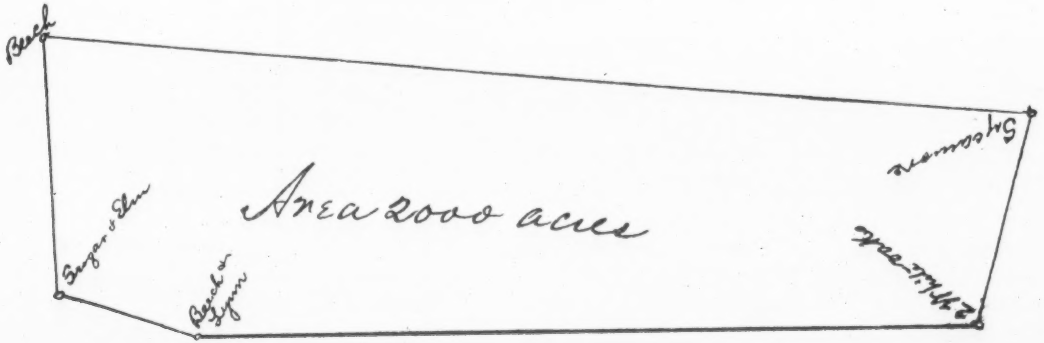
Surveyed for Albert Gallatin and Savary De Valcoulon 2,000 acres of land in Kanawha county on the S. W. side of the Great Kanawha river, joining a survey made for William Morris of 500 acres and near the upper end of a survey of 359 acres for Andrew Donnally and the lower end of a survey made for James
44 Armstrong, by virtue of a land office treasury warrant for 2,000 acres, No. 17562, issued to Richard Clai the 30th June, 1783, and is bounded as followeth, to wit:

Beginning at a beach on Armstrong's creek above the first forks of said creek, about 80 poles up from said fork and about 6 poles from the largest fork on the right-hand side thereof, thence down the creek N. 34° E. 325 poles to a sugar tree & elm, N. 31 W. 192

[redacted] ...vi- ... to ... aid ... col- ... on

44

No. 325
Halsted
v.
Buster et al
} p. 44



poles to a birch & lynn, corner to William Morris; thence with his line N. 57 W. 945 to two white oaks near Donnally's line, S. 53° W. 280 poles to sycamore on a creek; thence S. 49 E. 1,200 poles to the beginning.

REUBEN SLAUGHTER, *S. K. C.*

24th Aug't, 1794.

Copy.
Teste:

THOMAS SWINBURN,
Dep. for S. Chapman, S. K. C.

Fee, $1.00.

(Here follows diagram marked p. 44.)

Also a copy of a grant from the Commonwealth of Virginia to Albert Gallatin and Savary De Valcoulon for 2,000 acres,
45 dated 22d July, 1795, in the words and figures following, to wit:

Robert Brooke, Esquire, Governor of the Commonwealth of Virginia, to all to whom these presents shall come, Greeting:

Know ye that by virtue of a land office treasury warrant, number seventeen thousand five hundred and sixty-two, issued the thirtieth day of June, one thousand seven hundred and eighty-three, there is granted by the said Commonwealth unto Albert Galatine and Savary De Valcoulon a certain tract or parcel of land containing two thousand acres by survey bearing date the twenty-fourth day of August, one thousand seven hundred and ninety-four, lying and being in the county of Kenhawa on the southwest side of the Great Kenhawa river, joining a survey made for William Morris of five hundred acres and near the upper end of a survey made for Andrew Donnally of three hundred and fifty-nine acres and the lower end of a survey made for James Armstrong, and is bounded as followeth, to wit:

Beginning at a beech on Armstrong's creek above the first
46 forks of said creek about eighty poles up from the fork and about six poles from the largest fork on the right-hand side thereof, thence down the creek north thirty-four degrees east three hundred and twenty-five poles to a sugar tree and elm, north thirty-one degrees west one hundred and ninety-two poles to a brick and lynn, corner to William Morris; thence with his line north fifty-seven degrees west nine hundred and forty-five poles to two white oaks; thence leaving his line and running south fifty-three degrees west two hundred and eighty poles to a sycamore on a branch; thence south eighty-nine degrees east twelve hundred poles to the beginning, with its appurtenances; to have and to hold the said tract or parcel of land, with its appurtenances, to the said Albert Gelatine and Savary De Valcoulon and their heirs forever.

In witness whereof the said Robert Brooke, Esquire, Governor of the Commonwealth of Virginia, hath hereunto set his hand and

caused the lesser seal of the said Commonwealth to be affixed,
47 at Richmond, on the twenty-second day of July, in the year of our Lord one thousand seven hundred and ninety-five, and of the Commonwealth the twentieth.

ROBERT BROOKE.

LAND OFFICE, RICHMOND, VIRGINIA.

The foregoing is a true copy from the records.
Witness my hand and seal of office this 27th day of April, 1877.
[L. S.] S. H. BOYKIN,
Reg'r Land Office.

And it was agreed in open court, in the presence of the jury, by the respective parties to this action that the Gallatin and Savary title to the land described in said last-mentioned grant was, on or before March 22, 1842, forfeited to the Commonwealth for the non-payment of taxes due thereon and for the failure of the owners to cause the same to be entered on the books of the commissioners of the proper counties and have the same charged with taxes according to law.

The defendants also read in evidence a copy of proceedings had in Fayette county concerning the aforesaid forfeiture in the
48 words and figures following, to wit:

At a circuit superior court of law & chancery, held for the county of Fayette, at the court-house, on Monday, the 3d day of April, 1839.

Present: The Honorable Edwin S. Duncan, one of the judges of the general court and of the 9th judicial circuit.

The court appointed Alfred Beckley com'r of delinquent and forfeited lands in the place of Wm. Carnifix, resigned, who thereupon, with Wm. Carnifix and Aaron Stockton his security, entered into and acknowledged a bond in the penalty of $1,000, with conditions according to law, and also took the oath prescribed by law.

And at another day, to wit, at a circuit superior court of law and chancery continued and held for the county of Fayette, on Saturday, the 2d day of April, 1842, the commissioner of forfeited and delinquent lands for Fayette county this day made a report in writing that a tract of land containing 2,000 acres patented to Albert Gallatin and Savary de Vancoulon (*alias* John Savary) is forfeited
49 for reasons stated in the report, and the report by the court is ordered to be filed, and it is ordered that the commissioner do make sale of the said land at the next June term of Fayette county court on the terms and according to the provisions of the acts of Assembly in such cases made and provided, and that he report his sales to the court.

And on another day, to wit, at a circuit superior court of law and chancery continued and held for the county of Fayette, on Thursday, the 1st day of September, 1842, the commissioner of forfeited and delinquent lands this day made a report of the sale of a tract containing 2,000 acres patented — Albert Gallatin and John De Van-

coulon, *alias* John Savary, at which sale James Morris, for himself *et al.*, became the purchasers at the price of one hundred dollars, one-fourth part of which was paid in hand and the purchaser's bond taken for the residue. It is adjudged and ordered that the sale be confirmed, and the commissioner, after paying the expenses reported by him out of the purchase-money as received, *and* 50 dispose of the residue as directed by the acts of Assembly in such cases made and provided.

I, E. H. Easby, clerk of the circuit court of Fayette county and State of West Virginia, do certify that the foregoing is a true copy from the records of my office; and I further certify that I have made diligent search throughout my said office and find no other than the above proceedings relating to the patent of Gallatin & Savary for 2,000 acres of land.

Given under my hand this 27th day of April, 1877.

E. H. EASBY, *Clerk.*

They also proved that a book containing some of the records and proceedings of the commissioners of delinquent and forfeited lands for the county of Fayette, in the State — Virginia, now West Virginia, had been lost during the late war and could not be found.

The defendants also offered in evidence a copy of a deed made by Alfred Beckley, commissioner of forfeited & delinquent lands, to Mary Jones, in the words and figures following, to wit:

51 This indenture, made this fourth day of April, in the year of our Lord one thousand eight hundred and forty-three, between Alfred Beckly, commissioner of delinquent and forfeited lands in and for the county of Fayette and Commonwealth of Virginia, of the one part, and Mary Jones, of said county, of the other part:

Whereas the circuit superior court of law and chancery for the said county of Fayette did, by virtue of an act of the General Assembly of Virginia passed on the 30th day of March, 1837, entitled An act to amend and explain the laws concerning western land titles, and for other purposes, constitute and appoint the said Alfred Beckly commissioner of delinquent and forfeited land in and for the county of Fayette; and whereas, under the appointment aforesaid, and in pursuance of the said recited act and of the amendatory act of the General Assembly passed on the 15th day of March, 1838, entitled "An act to amend an act entitled 'An act to amend and explain the laws concerning western land titles, and for other purposes,'" the said Alfred Beckly, by virtue of an order of the judge of the circuit superior court of law and chancery for said 52 county made on the second day of April, 1842, did cause public notice to be given of the time and place of sale of the said land hereinafter described in a newspaper published nearest the place of sale, to wit, in the Western Whig, published in the tow- of Lewisburg, *on* the county of Greenbrier, and caused the same to be posted at the door of the court-house of said county and at least four other public places in said county for at least thirty days next preceeding the day of sale; and, in pursuance of the said advertise-

ment, did offer at public sale, at the door of the court-house aforesaid, on the 16th day of June, 1842, among others, the tract or parcel of land hereinafter described; and at the said public sale the said Mary Jones, the party of the second part, being the highest bidder, became the purchaser of part of a tract or parcel of land situate on Armstrong creek, in said county, containing 2,000 acres, patented to Albert Gallatin and John De Valcoulon, *alias* John Savary, on the 22d July, 1795, and forfeited in the name of their vendees,
53 and which part of said tract is bounded as follows, to wit:

Beginning at a beech on the bank of Armstrong's creek about 80 poles above the mouth of the first large branch from the N. W., thence N. 34° E. 280 poles to a division line agreed upon by the said Mary Jones and George Richards, and with said line from a walnut on the bank of the creek north 58° west to a certain point of a rock ledge on the top of the creek ridge, and with said ridge in all its meanders till it intersects the back or protracted line of the whole survey, and with said line south 49½ east to the beginning, containing four hundred acres, more or less; and the said sale having been confirmed by a decretal order made on the 1st day of September, 1842; and whereas, the whole of the purchase-money having been paid by the said party of the second part, the purchaser is now entitled by the provision of the first-recited act to a deed for the same from the said party of the first part, he, the said commissioner, conveying such title therein as the said act authorises to be conveyed or as he can convey as the authorised commissioner
54 as aforesaid (but without any personal responsibility whatever); Now, this indenture witnesseth that the said party of the first part, for and in consideration of $33.33, one-fourth whereof was to him in hand paid at the date of the sale aforesaid and the residue, together with $ —, interest accruing on said residue since the same became due, at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, do- hereby grant, bargain, sell, and convey unto the said party of the second part, her heirs and assigns forever, said part of said tract, to hold the same by and according to the metes, bounds, and abuttals above set forth, with all and singular the tenements, hereditaments, and appurtenances and all the right, title, and interest that the said party of the first part is, under and by virtue of the acts aforesaid and under and by virtue of his appointment as aforesaid, authorized to convey on and to the same; to have and to hold the same and all and singular the appurtenances aforesaid to the said party of the second part, her heirs and assigns forever.

55 In testimony whereof the said party of the first part has hereunto set his hand and seal the day and year above written.

ALFRED BECKLEY, [SEAL.]
Commissioner of Del. Forfeited Lands, Fayette Co.

FAYETTE COUNTY COURT
CLERK'S OFFICE, *4th April*, 1843.

This deed was acknowledged by the vendor in this office, and is admitted to record.

Teste: JAMES T. WAITE, *D. C.*,
For H. HILL, *C. F. C.*

A copy from the records in this office.

Witness my hand & official seal this 18th day of September, 1874.

G. M. BLUME,
[L. S.] *Clerk County Court, Fayette County, West Virginia.*

To the reading of which deed the plaintiff objected because the said proceedings in Fayette county did not show Mary Jones to be the purchaser of the land described in said deed, and because the defendants produced no decree of court directing a deed to be
56 made to her for the lands conveyed by said deed; which objections, after being argued and considered, were each of them overruled by the court, and the said deed was read in evidence to the jury as connecting said Mary Jones with the said Gallatin grant and as showing title in the defendants; to which decisions and rulings and to each of them the plaintiff then and there excepted.

The defendants also read in evidence a copy of a deed from Alfred Beckley, commissioner, to George Richards in the words and figures following, to wit:

This indenture, made this twentieth day of January, in the year of our Lord one thousand eight hundred and forty-six, between Alfred Beckley, commissioner of delinquent and forfeited lands in and for the county of Fayette and Commonwealth of Virginia, of the one part, and George Richards, of Fayette county, Virginia, of the other part: Whereas the circuit superior court of law and chancery for the said county of Fayette did, by virtue of an act of the General Assembly of Virginia passed on the 30th day of
57 March, 1837, entitled "An act to amend and explain the laws concerning western land titles, and for others purposes," constitute and appoint the said Alfred Beckley commissioner of delinquent and forfeited lands in and for the county of Fayette;

And whereas, under the appointment aforesaid and in pursuance of the said recited act and of the amendatory act of the General Assembly passed on the 15th day of March, 1838, entitled "An act to amend an act entitled 'An act to amend and explain the laws concerning western land titles,' and for other purposes,'" the said Alfred Beckley, by virtue of an order of the judge of the circuit superior court of law and chancery for said county made on the — day of April, 1842, did cause public notice to be given of the time and place of sale of the said land hereinafter described in a newspaper published nearest the place of sale (to wit, in the —, published in the town of Charleston, in the county of Kanawha) and caused

the same to be posted at the door of the court-house of said
58 county and at least four other public places in said county for at least thirty days next preceding the day of sale, and in pursuance of the said advertisement did offer at public sale at the door of the court-house aforesaid, on the 16th day of June, 1842, among others, the tract or parcel of land hereinafter described, and at the said public sale the said George Richards, the party of the second part, being the highest bidder, became the purchaser of lot or tract No. 2, being part of a tract or parcel of land of 2,000 acres on Armstrong's creek, a branch of the Great Kanawha river, patented to Albert Gallatin and John De Vancoulen, *alias* John Savary, on the 22d July, 1795, and forfeited in the name of John Savary, and which said tract or lot No. 2 is bounded as follows, to wit: Beginning at a walnut on the north bank of Armstrong's creek, thence N. 56° west to a remarkably rocky place or pile on the dividing ridge between the waters of Armstrong's and Morris creeks; thence with said ridge, with its various bearings, to the closing or protracted line of the patent, and with it reversed N. 45½ west about 115 poles to
59 division corner of part or lot No. 3, sold to James Morris, and with his line N. 33½° east 346 poles to the patent line, and with the same reversing south 57½° east 330 poles to lynn and birch; thence south 31° east 192 poles to Henry Banks' corner, and with a line of the original grant south 34° west about 45 poles to the intersection of the line from walnut to the pile of rocks upon the dividing ridge.

And whereas, the whole of the purchase-money being paid by the said party of the second part, the purchaser is now entitled by the provisions of the first-recited act to a deed for the same from the said party of the first part for and in consideration of $30.66⅔, one fourth whereof was to him in hand paid at the date of the sale aforesaid and the residue (together with $— interest accruing on said residue since the same became due) at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, do- hereby grant, bargain, sell, and convey to the said party of the second part, his heirs and assigns forever, said lot or tract No. 2, to hold
60 the same by and according to the metes, bounds, and abuttals above set forth, with all and singular the tenements, hereditaments and appurtenances and all the right, title, and interest that the said party of the first — own under and by virtue of the acts aforesaid and under and by virtue of his appointment as aforesaid authorized to convey in — to the same; to have and to hold the same and all and singular the appurtenances aforesaid to the said party of the second part, his heirs and assigns forever, subject to all the rights of occupant claimants according to the provisions of the several acts of Assembly in such cases made and provided.

In testimony whereof the said party of the first part has hereunto set his hand and seal the day and year above written.

ALFRED BECKLY, [SEAL.]

Commissioner of Forfeited & Delinquent Lands, Fay. Co.

FAYETTE COUNTY COURT,
CLERK'S OFFICE, *March 11th*, 1846.

61 Personally came before me in my office this day Alfred Beckly, commissioner of forfeited and delinquent lands in said county, party of the 1st part to the within indenture, and acknowledged the same to be his act & deed for the purposes therein expressed and desired the same to be recorded.

Teste: H. M. DICKINSON, *Cl'k.*

A copy.
Teste: M. T. DAVIS, *Clerk*,
By G. W. MILLEN, *Dep.*

Defendants also read in evidence sundry deeds and decrees transferring and conveying to the defendants the title acquired by Mary Jones and George Richards by the said deeds from Beckley, commissioner, to the lands described in the aforesaid deeds to Jones and Richards respectively, and proved that said deed to the said Mary Jones embraced all the lands described in the plaintiff's declaration which they have not disclaimed as aforesaid. The defendants also introduced evidence tending to prove that they and those under whom they claim have been in the possession of the land conveyed in the said deed to Mary Jones since the date
62 of its execution. The plaintiff then further to maintain the issue on his part read in evidence sundry entries in the words and figures following, and endorsed "Thomas Edgar for Wm. Wilson, three entries," to wit:

Thomas Edgar, for Wm. Wilson, enters 50,000 acres of land in Kanawha county by virtue of t-ree office treasury warrants, 20,000 acres each, to begin joining a survey made for Henry Banks of 10,000 acres on Cabbin creek and extend along back of Gallatin's & Co. survey made on and near the Kanawha river, & all the surveys & entries on the same as far up as the Montgomery line & to extend back for quantity, leaving room for all surveys and prior locations in said bounds, warrants Nos. 783 & 782 & 784.

October 24, 1794.
Entry Book No. 1, page 71st.
A copy.
Teste: JOEL S. QUARRIER,
Clerk Kanawha Co. C't.

Thomas Edgar, for Wm. Wilson, lifts his entry of 10,000 acres made between Skile's entry of 40,000 acres & Banks' lands at
63 the mouth of Ganley & enters the same joining back of his entry of 50,000 acres between Cabbin creek & the Montgomery line along up Kanawha, made the 24th October, 1794, by virtue of part of L. office T. warrant for 20,000 acres, No. 784.

Jan'y 25th, 1795.
Entry Book No. 1, page 86.
Teste: JOEL S. QUARRIER,
Cl'k Kana. Co. C't.

Thomas Edgar, for William Wilson, lifts his entry of 10,000 acres made on 12 pole the 24th Oct'r, 1704, & enters the same joining his entry of 50,000 acres between Cabbin creek and the falls of Kanawha river.

Jan'y 20th, 1795.

Entry Book No. 1, page 84.

A copy.

Teste:

JOEL S. QUARRIER,
Cl'k Kanawha County C't.

It was admitted also by the parties in open court, in the presence of the jury, that, in addition to the foregoing entries, Thomas Edgar, for William Wilson, on the 10th day of April, 1795, regularly entered 15,600 acres in Kanawha county, which entry added to the foregoing entries aggregates 85,600 acres (exclusive of 6,786
64 acres), on which the Martin grant is founded.

Also an entry dated the 12th day of April, 1785, in the words and figures following, to wit:

Albert Galiton & Savary De Valcoulon, among others, made the following entr*ys*, to wit: For 100 acres, 1,900 acres, 5,000 acres, 4,000 acres, and also 8,000 acres on 3 State warrants—one, No. 15240, dated 2d April, 1783, to Michael Ryan; one, No. 21941, dated 24th Dec'r, 1783, & the other, No. 15195, dated 2 Ap'l, 1783, granted to Philip Slaughter, on the Gr*ate* Kanawha, so as to include all the vacant land on it between the entry of Andrew Donnally at the Gr*ate* Falls of the river and the several entr*ys* made in Campbell's bottom & near it, little above and near Elk, leaving room for the entry made in the several places of that space, & also to extend back of the said entry of Donnally's one mile above it on the Kanaw-a, the af's'd entry to be laid in as meny surveys as necessary to include all the vacant lands in the limits set by said location on the Gr*ate* Kanawha.

Apri*le* 12th, 1785.

Copy.

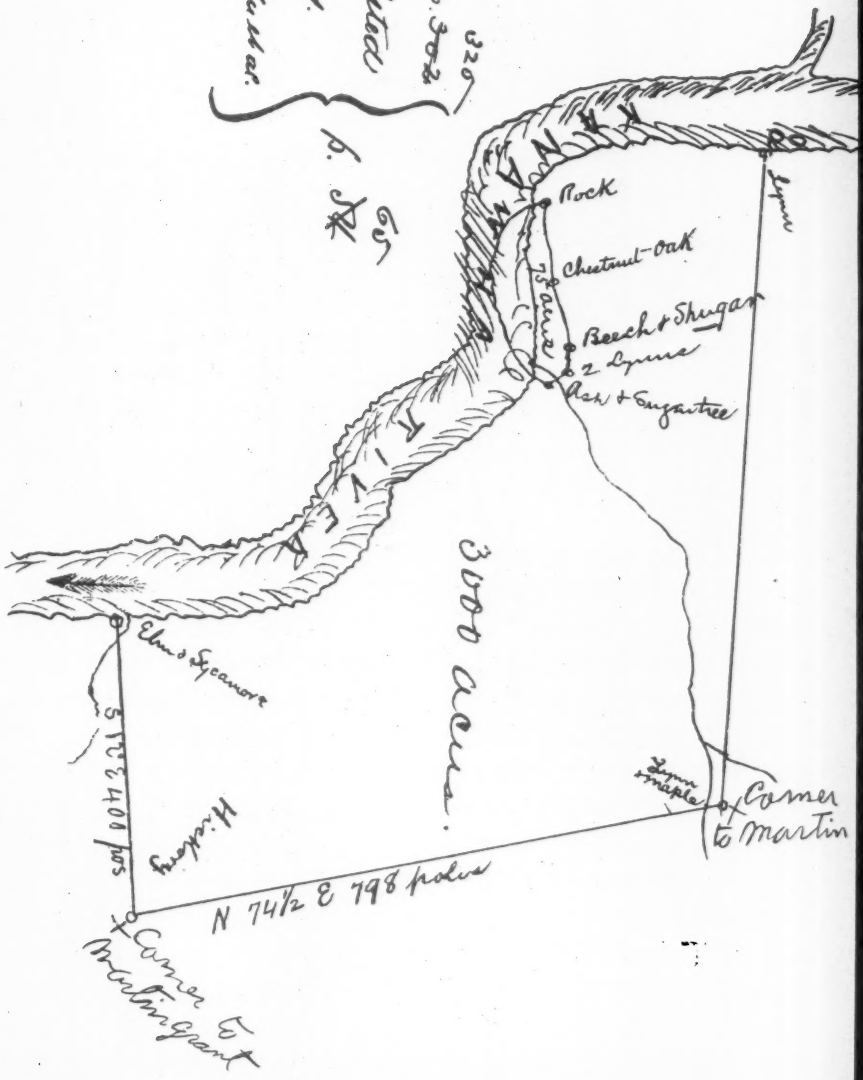
Teste:

THOMAS SWINBURN,
Dep. for S. Chapman, S. K. C.

65 Also a survey of 3,000 acres for Albert Gallatin and Savary De Valcoulon, dated 3d August, 1794, in the words and figures following, to wit:

(Here follows diagram marked p. 65.)

Surveyed for Albert Gallatin and Savary De Valcoulon 3,000 acres of land in Kanawha county, on the S. W. side of the Great Kanawha river, joining around, above, and below a survey made for William Morris & Andrew Donally, at the Great Falls of said river, by virtue of a land office treasury warrant for 500 acres, No. 21941, ass'e of James Hawkins, who was assignee of David Anderson, and is bound*eth* as followeth, to wit: Beginning at a lynn opposite the mouth of Ganley river, on the bank of Kanawha,


320
No. 302
Walked
on
Rockwood
S. 65 W.
Rock
Chestnut-Oak
75 acres
Beech & Sugar
2 Lynne
Oak & Sugartree
Lynne
Elm & Sycamore
3000 acres.
Hickory
S 12 E 400 pls
Lynne maple
Corner to Martin
N 74½ E 798 poles
Corner to Martin Grant

and also opposite two large rocks about 20 poles in the river, and thence down the river with its meanders and binding therewith three hundred and fifty-four poles to a large rock in the river, corner to Donnally & Morris, and with these lines S. 50 E. 78 poles to chestnut oaks, corner to the same, S. 15 E. 80 poles to a beech & sugar tree, corner to the same, south 50 poles to two
66 lynns, corner to the same, S. 65 W. 48 poles to an ash & sugar tree on the bank of the river; thence down the river with its meanders and binding thereon seven hundred and seventy poles to a sycamore & elm on the bank of the river, joining or near the land surveyed for James Armstrong; thence leaving the river and running S. 12° E. 400 poles to a hickory on a spur of a ridge; thence N. 74° E. 798 poles to a lynn and maple on the point of a hill in the fork of a creek and about 15 poles from the main forks of said creek, which creek empties into Kanawha in the land surveyed for Donnally & Morris; thence N. 1 W. 843 poles to the beginning.

3d Aug., 1794.

REUBEN SLAUGHTER, *S. K. C.*

Copy from Record Book 1, page 34.

A copy from the record.
Teste: HAMILTON MORRIS,
Cl'k Kanawha County Court.

And proved that the Martin grant calls for the southern boundary of this 3,000-acre survey and that said survey lies between the said Martin grant and the Great Kanawha river.

67 Also an entry dated the 12th day of April, 1783, in the words and figures following, to wit:

Albert Galiton & Savary De Valcoulon, among others, made the following entr*ys*, to wit: For 100 acres, 1,900 acres, 5,000 acres, 4,000 acres, and also 8,000 acres on 3 State warrants—one, No. 15240, dated 2d April, 1783, to Michael Ryan; one, No. 21941, dated 24 Dec'r, 1783, & the other, No. 15195, dated 2d Ap'l, 1783, granted to Philip Slaughter on the Gr*ate* Kanawha, so as to include all the vacant land on it between the entry of Andrew Donnally at the Gr*ate* Falls of the river & the several entr*ys* made in Campbell's bottom & near it, little above & near Elk, leaving room for the entr*ys* made in the several places of that space, & also to extend back of the said *said* entr*ys* of Donnally's one mile above it on the Kanawha, the af's'd entry to be laid in as meny surveys as (are) necessary to include all the vacant lands in the limits set by said location on the Gr*atate* Kanawha.

Aprile 12th, 1783.

Copy.
Teste: THOMAS SWINBURN,
Dep. for S. Chapman, S. K. C.

Also 4,000 acres added to the foregoing entry in 3 land office warrants—one, No. 15466, dated 11th Ap'l, 1783, granted to John Lewis, & No-. 17562 & 17566, & dated 30th June, 1783, granted to Richard

Claiborne, so that the whole 12,000 be surveyed as the 8,000 had been directed by said entry.

Apr-le 12th, 1785.

Copy.

Teste: THOMAS SWINBURN,
Dep. for S. Chapman, S. K. C.

68 Also a survey for 2,000 acres for Albert Gallatin and Savary De Valcoulon, dated the 28 of August, 1794, in the words and figures following, to wit:

(Here follows diagram marked p. 68.)

Surveyed for Albert Gallatin & Savary De Valcoulon 2,000 acres of land in Kanawha county, on the S. west side of the Great Kanawha river, joining the lands of John Hansford, Wm. Prior, & Andrew Donnally, by virtue of a land office treasury warrant, for 2,000 acres, No. 15240, and dated 2d Ap'l, 1783, issued in the name of Michael Ryan, and is bounded as follows (to wit):

Beginning at a black oak, corner to Hansford, and running with his line N. 57° W. 337 poles to a chestnut, corner to same, & N. 56° E. 100 poles to a poplar & birch, on the bank of the river; thence down the river with its meanders 293 poles to a small lynn grown from a large stump on the bank of Kanawha river; thence leaving the river and with a line of William Prior's S. 35° W. 15 poles to a poplar, corner to the same, S. 78° W. 395 poles to a poplar, S. 47° W. 390 poles to a poplar, corner to Donnally, and with his lines S. 40° W. 50 poles to a beech & sugar tree, S. 35° E. 44 poles to a black oak & white oak, E. 92 poles to two beeches, N. 77° E. 30 poles to two pines near the bank of Cabin creek; thence leaving Donnally's lines & running N. 82 E. 914 poles to the beginning.

28th Aug't, 1794.

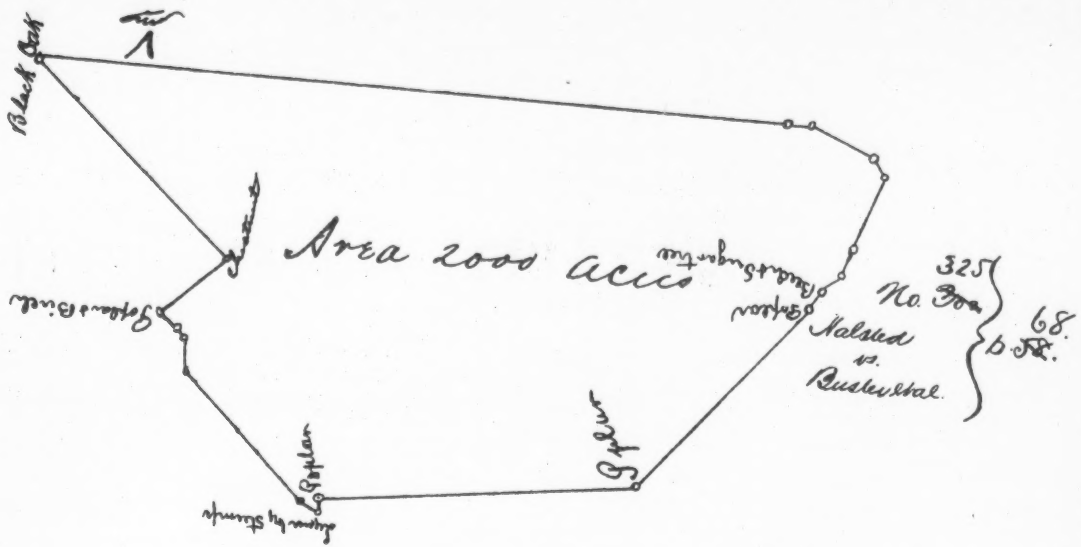
REUBEN SLAUGHTER, *S. K. C.*

Copy.

Teste: THOMAS SWINBURN,
Deputy for S. Chapman, S. K. C.

And proved that this survey lies between the said Wilson survey for 85,600 acres and the Great Kanawha river, and that the southern boundary of the said 2,000 acres runs through the beginning corner of the said Wilson survey at the "2 beeches" designated by the index on said map No. 4.

The plaintiff also read in evidence two certificates, numbered 1 and 2, respectively, and proved the due payment of the taxes assessed on the lands granted to Benjamin Martin aforesaid up to and including the year 1842, which certificates are in the words and figures following, to wit:


Area 2000 acres
325
No. Box
68.
b. St.
Nalsad
vs.
Bushnell

(No. 1.)

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE AUDITOR OF PUBLIC ACCOUNTS,
RICHMOND, VA., *April* 29, 1881.

I, R. A. Noel, first clerk in the office of the auditor of public accounts for the Commonwealth of Virginia, and, in the absence of said officer, acting auditor of public accounts, do hereby certify that it appears from the records of my office, which I have caused to be carefully examined, that on the 30th day of June, 1838, Judah Dobson paid into the treasury, through this office, the sum of $23.10 on account of the redemption of 85,600 acres of land on the Great Kanawha river, in Kanawha county, returned as delinquent for the taxes due thereon for the years 1835, 1836, & 1837.

Given under my hand the day and year above written.

R. A. NOEL,
Act'g Auditor.

(No. 2.)

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE AUDITOR OF PUBLIC ACCOUNTS,
RICHMOND, VA., *April* 29, 1881.

I, R. A. Noel, first clerk in the office of the auditor of public accounts for the Commonwealth of Virginia, and, in the absence of said officer, acting auditor of public accounts, do hereby certify that it appears from the records of said office, which I have caused to be carefully examined, that on the 19th July, 1836, John G. Mosby, for H. O. Middleton, paid into the treasury through this office the sum of $61.92, in redemption of a tract of 85,600 acres of land on Kanawha and New rivers, in the county of Fayette, in the name of Judah Dobson, which land was omitted from the books of the commissioner of the revenue for the years 1811 to 1835, both inclusive.

Given under my hand the day and year above written.

R. A. NOEL,
Act'g Aud't'r.

The plaintiff then read in evidence a survey made for Andrew Reed and John Stewart for 50,000 acres in the words and figures following, to wit:

Surveyed for Andrew Reed and John Stuart 50,000 acres of land by virtue of two entries, one *the* made the 4th day of August, 1794, for 25,629 acres on two land office treasury warrants for 19,471 acres, numbered 18199, granted to John Strother, Jun'r, the 30th day of July, 1783, and No. 14931, granted to Hannah Coon the 10th of Dec'r, 1782, and 6,158 acres, part of *a* land office treasury warrant No. 19830, granted to Obadiah Smith the 10th of Oct'r, 1783. The other entry, for 24,371 acres, made the 4th day of June, 1795, on *a* land office treasury warrant No. 1378, granted to Henry Banks the 19th day of May, 1795, and 4,371 acres, part of *a* land office treasury [warrant] No. 1057, granted to Joseph Meze the 3d of January, 1795,

lying in Montgomery county, on the west side of New river "*alias*" Kanawha, including Loop creek, Arbuckle's creek, and Pipe creek, and bounded as follows: Beginning at a white oak marked J. M., a chestnut and black oak on top of the river ridge below the mouth of Piney river and corner of Moore and Beckley's survey, and with their lines S. 80° W. 258 poles to two chestnut oaks; S. 30° W. 246 to a hickroy and white-oak sapling; S. 76° W. 94 to two white oaks; S. 10° E. 158 to two Spanish oaks and a chestnut; S. 50° W. 686 poles to a black oak and two white; N. 70° W. 46 to a black oak and chestnut; S. 75° W. 192 to two pines in a glade; N. 40° W. 114 to a white oak and oak marked J. M., and several other brazed trees; thence leaving Moore & Beckly's line north 450 poles to 2 chestnuts on a ridge; N. 40 W. 72 to two chestnuts and chestnut oak; N. 62 W. 64 to a white oak and two poplars; north 106 to a chestnut oak and chestnut; N. 45° W. 88 p. to 2 chestnuts and chestnut oak;
69 N. 23 E. 36 to a chestnut and white oak on Stuart's ridge, between the waters of the Loop and Paint creeks; N. 70° W. 100 to a chestnut oak, white oak, and small poplar; N. 18 E. 216 to two chestnut oaks on a ridge; N. 9° E. 298 to two chestnuts and small poplar on a ridge; N. 36 E. 40 to a black oak and chestnut; N. 102 to a chestnut, chestnut oak, and sour-wood sapling; N. 18 W. 242 to a black oak, gum tree, and chestnut on a ridge; N. 23° E. 52 to a black oak and white-oak sapling; N. 30° W. 184, crossing a small fork of Paint creek, to two white oaks in a draft; N. 650 p. to a black and Spanish and a chestnut oaks on the point of a ridge; N. 39° E 100 p. to two white oaks on a ridge; N. 58 to two Spanish oaks; N. 40 E. 68 to a Spanish and white oaks on a ridge; N. 17° W. 110 to a maple and chestnut oak; N. 18 E. 1,020 to a dogwood, a small poplar, and chestnut on a high ridge and along the same; N. 22° E. 116 to a black oak and red oak; N. 50° E. 40 to a black oak and white oak; N. 27° E. 190 to a black oak and three Spanish oaks; N. 41° W. 980 to two Spanish oaks marked J. E. and four chestnuts marked J. M., S. P., & W. R., on Farley's sugar tree mountain on the S. side of Pack's gap; N. 246 to 3 sugar trees on the side of a ridge; east 158 to three chestnut oaks on top of the mountain; N. 46° W. 74 to two sugar trees and a chestnut oak on said mountain; N. 30° E. 140 to two elms; N. 8° E. 144 to a Spanish and chestnut oaks and sugar tree; N. 10° W. 132 to three chestnut oaks near a pinnacle of rocks; N. 70° E. 132 to 3 chestnut oaks; E. 52 to a lyn- and buckeye; N. 25° E. 1,040 to a white oak marked W. R. and chestnut marked J. S., J. M., and maple marked S. P. in a hollow; N. 40° E. 24 to a maple and Spanish oak on the river ridge; S. 242 to two white oaks and red oak marked J. S. near the bank of the river and up the several courses thereof, and binding thereon 5,220 poles, to a *sace*fras, two ash trees, and marked S. P., a Spanish oak and lynn on the river bank; thence continuing up and with the meanders of the river 1,056 poles to a beech; thence leaving the river S. 62° W. 186 to a sugar tree on the side of a ridge; S. 25° W. 40 to a poplar and hickory near the river; west 36 poles to a chestnut oak marked J. S. and chestnut oak sapling on the side of a ridge above a large deerlick; S. 28° W. 400 to an ash, sugar tree,

and buckeye; S. 10° E. 30 to two ash trees and poplar near the river; S. 71° W. 16 to two water beeches and a sycamore on the edge of the river; N. 83° W. 240 up the river ridge to a poplar and Spanish oak; S. 62° W. 110 poles to the beginning. An allowance of 27,662¼ acres is made in the calculation of the area of this platt for three surveys, viz., two of 12,300 acres each and one of 3,062¼ acres, made for Henry Banks and contained in the boundary thereof.

Compleated the 10th of June, 1795.

JOHN JAMESON &
THOS. FEANSTON,
Chainmen.
SAMUEL PACK &
JAMES ELLIS,
Pilots and Marksmen.

70 L. OFFICE.

A copy from the original.

Teste: JOHN MATHEWS, *Ass't.*
GORDON CLOYD, *S. M. C.*

Teste: W. SELDEN,
Reg. L'd Off.

January 31st, 1825.

The following is a copy of the map accompanying the last aforesaid survey, to wit:

(Here follows diagram marked p. 70.)

And proved that from 1,500 to 2,000 acres of this survey lies within the Martin grant on the southeast end thereof.

Also an entry made for Thomas Edgar, 4th March, 1795, in the words and figures following, to wit:

1795, March 4. Surveyed by W. D.

Thomas Edgar, by virtue of 2 land office treasury warrants, one, No. 693, granted to Alex'r Porter and James Welch the 9th of Sept., 1794, 5,000 acres of which is unappropriated; the other, No. 15902, a duplicate, granted to Colo. Wm. McWilliams, & the property of Henry Banks, and by him assigned to Thos. Edgar, for 4,000 acres, and a certificate for 730 acres lodged in the surveyor's office of Greenbrier, No. 469, dated 29th of May, 1794, granted to Henry Bowyer, in all amounting to 9,730 acres, enters the same below and adjoining Colo. John Stuart's and Andrew Reid's entry of 31,356½ acres.

The above is a true copy of the entry made by Thomas Edgar of 9,730 acres in Entry Book D, page 23, in the surveyor's office in Montgomery county, Va.

Teste: R. R. LINKONS,
Su. M. Co., Va.

Also a copy of a survey made for Thomas Edgar for 9,730 acres in the words and figures following, to wit:

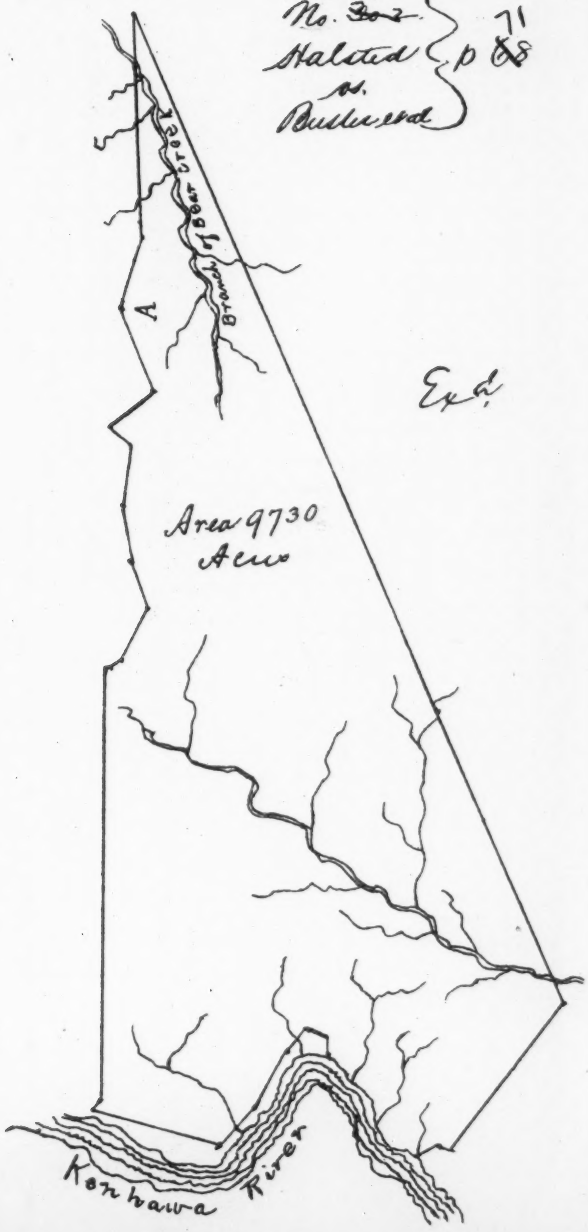
(Here follows diagram marked p. 71.)

Surveyed for Thomas Edgar 9,730 acres of land by virtue of an entry made 4th of March, 1795, on the following land office treasury warrants, "viz:" 5,000 acres, part of a land office treasury warrant No. 693, granted to Alexander Porter & James Welch the 9th of September, 1794; 4,000 acres on a land office treasury warrant No. 15902, granted to Colo. William McWilliams the 8th of May, 1783, and 730 acres, part of a land office treasury warrant No. 469, granted to Henry Bowyer the 29th of May, 1794, lying in Montgomery county, on the Kenhawa river, a small distance above the falls, and bounded as follows: Beginning at two Spanish oaks marked I. E. and four chestnuts marked I. M. S. P. & W. R. on Farly's sugar-tree mountain, on the south side of Pack's gap, and corner of Ried's and Stuart's loop survey, and joining and below Andrew Reid's entry of 31,356 acres, and thence with the lines of the 71 & 72 loop survey N. 246 poles to three sugar trees on the side of a ridge, east 158 to 3 chestnut oaks on the top of the mountain, N. 46 W. 74 to two sugar trees and a chestnut oak on said mountain, N. 30° E. 140 to two elms, N. 8 E. 144 to a Spanish & chestnut oaks and a sugar tree, N. 10 W. 130 to three chestnut oaks near a pinnacle of rocks, N. 70 E. 132 to three chestnut oaks, east 52 to a lynn and buckeye, N. 25 E. 1,040 to a white oak marked W. R. and chestnut marked I. S. I. M. and maple marked S. P. in a hollow, N. 50 E. 24 to a maple and Spanish oak on the river ridge; thence leaving s'd line N. 33 W. 132 to a white oak and red oak, S. 66 W. 116 to a white oak and red oak, S. 47 W. 120 to two hickories in a hollow, S. 76 W. 96 to a maple and a large poplar, N. 46 W. 58 to a poplar and maple on the north side of a hill, N. 3 E. 54 to a chestnut and chestnut oak on the bank of the river and down the several courses thereof and binding thereon, 342 poles to two maples and a chestnut oak; thence leaving the river W. 54 poles to two chestnuts on west side of a hill, N. 55 W. 30 to two beech trees by a small branch, south 67° west 470 to a beech and chestnut on the bank of a creek, S. 318 poles to a double sugar tree, lynn, maple, and chestnut oak on a sharp ridge by a stack of rocks, S. 7° W. 2,320 to two white oaks and a poplar near a branch of Bear creek and on a line of Reed's survey and with the same N. 41 E. 486 poles to three chestnut oaks on a high ridge, a corner of Reed's survey, N. 52 E. 232 poles to the beginning; variation, 3° E.

Completed 20th April, 1796.

WM. DINGESS, *Ass't.*
GORDON CLOYD, *S. M. C.*
SAMUEL PACK,
Pilot and Director.
WILLIAM HILTON &
SAMUEL PACK, JR.,
Chainmen.

No. 375
Halsted
vs.
Buchanan
p 71 & 88



The foregoing survey is a true copy from land book, page 231, in the surveyor's office of Montgomery Co., Va.

Teste: B. R. LINKONS,
Su'v'r M. Co., Va.

And proved that 6,817 acres of this survey lie within the said Martin's grants, adjoining the aforesaid Ried and Stuart survey, and that no part of the said Ried and Stuart survey or the said Thomas Edgar survey lies within the said interlock caused by the said overlapping of the said Martin and Gallatin grants as aforesaid.

Upon this state of facts the plaintiff asked the court to instruct the jury in the words and figures as follows, to wit:

Plaintiff's Instruction No. 1.

73 JOHN HALSTED
vs.
MARY A. BUSTER and SARAH A. BUSTER, Heirs-at-Law of William Buster, Dec'd. } In Ejectment.

The court instructs the jury inasmuch as it is a conceded fact in this cause that the Gallatin survey of 2,000 acres which has been given in evidence by the defendants, under which they claim, was at the date of the passage of the act of March 22nd, 1842, concerning delinquent and forfeited lands, forfeited to the Commonwealth for the non-payment of taxes due thereon or for the failure of the owners to cause the same to be entered on the books of the commissioners of the proper counties and have the same charged with taxes according to law, that the said survey then was by reason of such forfeiture vested in the Commonwealth; and if the jury find from the
74 evidence that the boundaries of the William Wilson survey of 85,600 acres and the grant thereunder given in evidence by the plaintiff and under which he claims included any part of the land embraced within the boundary of the said forfeited survey, and that the persons having just title or claim to said Wilson's survey at the passage of the act aforesaid shall have paid all the taxes duly assessed and charged against them and all taxes that ought to have been assessed as charged from the time they acquired title thereto, then by virtue of the said act of March 22, 1842, that portion of the forfeited survey embraced within the boundary of the Wilson survey which had become and was vested in the Commonwealth became absolutely transferred to and vested in the said persons having such title and claim to said Wilson survey, except so far as any persons made *bona fide* claim to any part of said land by title, legal or equitable, derived from the Commonwealth, and on which the taxes had been fully paid up
75 according to law; to the giving of which instruction the defendants objected, and in lieu thereof the court, at the instance of the defendants, instructed the jury as follows, to wit: If the jury find from the evidence that the grant to Gallatin and Savary, under which the defendants claim, is older than the grant to

Benjamin Martin, assignee of William Wilson, under which the plaintiff claims, and that the Gallatin and Savary grant is founded on an older entry and survey than the entry and survey upon which the Martin grant is founded, and that any portion of the land in controversy is included within the calls of each of said grants, then the court instructs the jury that that portion of the Gallatin and Savary survey within the said Martin survey was excepted and reserved in and from the operation of the Martin grant, and that the grant to said Martin, assignee, &c., vested in him no title
76 or claim of title to so much of the Gallatin & Savary grant as was included within the limits of the said Martin grant, and that the plaintiff has acquired no title or claim of title to the land in controversy in this action by virtue of the forfeiture of the Gallatin and Savary title to the Commonwealth of Virginia.

To the giving of which instructions the plaintiff objects, and, the said objections of the defendants and plaintiff, respectively, being argued and considered, the court was of the opinion to and, did accordingly sustain the defendants' objections to the plaintiff's aforesaid instructions, and did overrule the plaintiff's said objections to the defendants' said instructions; and thereupon the court refused to instruct the jury as requested by the plaintiff, but did instruct the jury as requested by the defendants; to which foregoing decisions,
77 rulings, and actions, and to each of them, the plaintiff then and there excepted, and his said exceptions are signed, sealed, and reserved to him.

J. J. JACKSON.

November —, 1887.

And not at this day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, on the 30th day of November, 1887, being the same day and year first herein mentioned.

The plaintiff desiring to appeal from the judgment of the court rendered in this cause to the Supreme Court of the United States, and it appearing from the affidavits filed in the cause that the land in controversy exceeds in value the sum of $5,000.00, the court certifies that the matter in controversy in this cause, exclusive of costs, exceeds the sum of $5,000.00. A writ of error and supersedeas
78 is allowed the plaintiff on his executing a bond, with good security, in the penalty of $2,000.00, conditioned according to law, to be approved by a judge of a circuit or district court of the United States, and filing the same in the clerk's office of this court, at Charleston. Execution is stayed on said judgment for sixty days.

The bond above required is in the words and figures following, to wit:

District Court of the United States of America for the District of West Virginia, in the Fourth Circuit.

JOHN HALSTEAD
vs.
MARY A. BUSTER and SARAH A. BUSTER. Heirs, &c.
} In Ejectment. Bond for Damages and Costs.

Know all men by these presents that we, John Halstead and Joshua Van Brimmer, are held and firmly bound unto the
79 above-named Mary A. Buster and Sarah A. Buster, heirs-at-law of Wm. B. Buster, in the sum of two thousand dollars, to be paid to the said Mary A. Buster & Sarah A. Buster; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the twelfth day of December, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas the above-named John Halstead has prosecuted an appeal to the Supreme Court of the United States to remove the judgment rendered in the above-entitled suit by the judge of the district court of the United States for the district of West Virginia, holden at Charleston, in said district:

Now, therefore, the condition of this obligation is such that if the above-named John Halstead shall prosecute the said appeal
80 to effect and answer all damages and costs if he should fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN HALSTEAD.
JOSHUA VAN BRIMMER.

Sealed and delivered and taken and acknowledged this 12 day of December, 1887, before me—

JOHN A. SHIELDS,
U. S. C. Judge.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

John Halstead, of Mauch Chunk, Pa., and Joshua Van Brimmer, 17 Park Row, New York city, being duly sworn, each deposes and says, each for himself, that he is worth the sum of four thousand dollars over and above all his just debts and liabilities.

81 JOHN HALSTEAD.
JOSHUA VAN BRIMMER.

Sworn to this 12th day of December, A. D. 1887, before me—

JOHN A. SHIELDS,
U. S. C. Judge.

(Endorsed:) U. S. district court for the district of West Virginia, 4th circuit. John Halstead *vs.* Mary A. Buster & *al.* Bond for

costs on appeal. Bond approved as to form and sufficiency as to amount. New York, Dec. 12th, 1887. E. Henry Lacombe. Filed Dec. 17th, 1887. Teste: J. Y. Moore, cl'k D. C. U. S., D. W. Va.

Owns house and lot, used for business purposes, unencumbered on Goerck St., N. Y. city.

T. G., *Clerk.*

Bond approved.

J. J. JACKSON,
U. S. D. Judge.

82 U. S. District Court for the District of West Virginia, 4th Circuit.

JOHN HALSTEAD
ag'st
MARY A. BUSTER *et als.*

STATE OF NEW YORK,
City and County of New York, } *ss:*

Joshua Van Brimmer, being duly sworn, deposes and says that he resides at No. 17 Park Row, in the city of New York; that he is a freeholder in said city; that he owns property at 138 Goerck street, and that it is worth over eight thousand dollars and is unencumbered. The property — a building 25 ft. by 100 feet, used for business purposes.

JOSHUA VAN BRIMMER.

Subscribed and sworn to before me the 12th day of Dec., 1887.
TIMOTHY GRIFFITH,
Clerk U. S. C. C.

83 From oral examination, as well as the above affidavit, I believe the surety on bond for appeal to be sufficient.

T. G., *Clerk.*

I, Jasper Y. Moore, clerk of the district court of the United States for the district of West Virginia, do certify that the foregoing is a true and correct transcript of the record and proceedings in the action of ejectment lately pending in my said court, at Charleston, wherein John Halstead was plaintiff and Sarah A. Buster & others were defendants, except an entry mentioned on page 43 of this record as not found in the papers, and also the order allowing an appeal, dated and recorded the 30th day of May, 1883, and also "bill of exceptions No. 2," taken at a previous trial of this cause and embraced within a former record of this case.

Seal District Court United States, District West Virginia, Charleston, West Va.

In testimony whereof I hereunto subscribe my name and affix the seal of my said court, at Charleston, this 28th day of January, A. D. 1888.

JASPER Y. MOORE,
Clk D. C. U. S., D. W. Va.

Fee for record, $45.60.

84 THE UNITED STATES OF AMERICA:

The President of the United States to the honorable the judge of the district court of the United States for the district of West Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, at Charleston, between John Halsted and Sarah A. Buster and Mary A. McGee (late Mary A. Buster), a manifest error hath happened, to the great damage of the said John Halsted, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning
85 the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal District Court United States, District West Virginia, Charleston, West Va.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 26th day of January, in the year of our Lord one thousand eight hundred and eighty-eight.

JASPER Y. MOORE,
Cl'k D. C. U. S., D. W. Va.

Copy of the above writ filed in the clerk's office dist. c't U. S., at Charleston, in said cause.
January 26th, 1888.
Teste:

JASPER Y. MOORE,
Cl'k D. C. U. S., D. W. Va.

85½ [Endorsed:] John Halsted *v.* Sarah A. Buster & oth's. In eject. Writ.

86 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Sarah A. Buster and Mary McGee (late Mary A. Buster):

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the district of West Virginia, at Charleston, wherein John Halsted is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected

and why speedy justice should not be done to the parties in that behalf.

87 Witness the Honorable John J. Jackson, judge of the said district court, this 2*th* day of January, A. D. 1888.

J. J. JACKSON, *Judge.*

[Endorsed:] John Halsted *v.* Sarah A. Buster & oth's. In eject.

88 UNITED STATES OF AMERICA, *District of West Virginia,* } *ss:*

To the honorable justices of the Supreme Court of the United States:

And now comes John Halsted, by A. Burlew, his attorney, and complains that in the record and proceedings and also in the rendition of a judgment in a suit between John Halsted, plaintiff, and Sarah A. Buster and Mary A. McGee (formerly Mary A. Buster), heirs-at-law of Wm. B. Buster, deceased, defendants, tried in the district court of the United States for the district of West Virginia, and exercising circuit court powers at the November term, 1887, and in which a judgment was rendered against him on the 22nd day of November, 1887, manifest error hath intervened, to the great damage of the said John Halsted, in this: 1st, it was error to refuse to instruct the jury as requested by the plaintiff; 2nd, it was error to instruct the jury as requested by the defendants; wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

A. BURLEW,
Att'y for Pl'ff in Error.

[Endorsed:] John Halsted *vs.* Sarah A. Buster & Mary A. McGee. In ejectment. D. C. U. S., D. W. Va.

Endorsed on cover: West Virginia D. C. U. S. No. 325. John Halstead, plaintiff in error, *vs.* Sarah A. Buster and Mary A. McGee (late Mary A. Buster). Filed February 6, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 325.

STIPULATION AND ADDITION TO RECORD.

JOHN HALSTED
vs.
SARAH A. BUSTER *et al.* } In Ejectment.

We hereby agree that on the hearing of the foregoing cause, now pending in the Supreme Court of the United States on writ of error, that the plat certified by the clerk of the district court of the United States for the district of West Virginia as a part of the transcript of the record of said cause, marked "Exhibit B," shall be regarded and treated on the hearing of said cause in said Supreme Court as if the same had been certified as a true copy of the plat referred to in said record, marked X, and that the letters and figures upon said "Exhibit B," with said record, shall be changed to correspond with the letters and figures on said plat marked X, a true copy of which latter exhibit is hereto attached; and we agree that this paper may be filed in the Supreme Court in said cause without further notice.

Charleston, W. Va., February 6th, 1891.

A. BURLEW,
Att'y for Pl'ff in Error.
W. MOLLOHAN,
J. F. BROWN,
Att'y- for Defendants in Error.

[Endorsed:] Supreme Court U. S. 1890, October term. No. 325. John Halstead, pl'ff in err., *vs.* Sarah A. Buster & *al.* Stipulation and addition to record.

[Stamped:] Office Supreme Court U. S. Filed Feb. 17, 1891. James H. McKenney, clerk.

Office Supreme Court U. S.
FILED,
FEB 19 1891
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

—OF THE—

UNITED STATES.

JOHN HALSTED

vs.

SARAH A. BUSTER ET AL.,

IN EJECTMENT.

BRIEF AND POINTS FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

JOHN HALSTED
vs.
SARAH A. BUSTER, ET AL. } IN EJECTMENT.

To the Honorable Judges of the Supreme Court:

I submit the following brief and points as attorney for the plaintiff in error in this action:

On the first Monday in August, 1873, John Halsted, a citizen of the State of New York, brought an action of ejectment in the District Court of the United States, for the District of West Virginia, against William B. Buster and Eldridge Barrett, to recover certain tracts of land situate in Fayette county, in said District. One of the tracts is described by courses and distances, supposed to contain two thousand acres, and the other is described as containing about one hundred acres.

The defendants disclaimed title to all the lands in the plaintiff's declaration, except the following parcel, to-wit: Beginning at the point marked "B" on the palt marked "X" and thence with the blue line to the point "D," thence with the red line to the point "J" on the top of the ridge and said point being on the outer line of the Gallatin 2,000 acres; thence with the top of said ridge towards Kanawha

river to the point "P;" thence with the red line to 13; thence with the blue line to the place of beginning at the point "B" —(Printed record, page 8) which is the one hundred acres mentioned in the declaration. By agreement of parties, the plat in the record marked "B" is to be treated as if the same were marked "X" except the letters and figures therein which is to be changed to correspond with the letters and figures on plot "X" a copy of which is filed with the agreement.

William B. Buster died shortly after the action was brought, and the action was revived in the name of Mary A. Buster and Sarah A. Buster, and the action was dismissed as to Eldridge Barrett.

On the 21st day of November, 1887, the case was submitted to a jury, and on the 22d day of November, 1887, the jury returned a verdict "for the defendents," and thereupon the defendents were discharged, and a judgment for costs entered against the plaintiff. (Record page 9.)

The plaintiff's title rests on a survey made for William Wilson, on the 14th of April, 1795, for 85,600 acres, followed by a patent from the Commonwealth of Virginia to Benjamin Martin, assignee of William Wilson, dated January 1st, 1796, for the land described in the survey.

The survey to William Wilson concludes with the following reservation, to wit: "Including 6,786 acres of prior claims, for which there is an allowance made in the calculation." (Page 10.)

And the grant to Martin concludes as follows: "But it is always to be understood that the survey upon which this grant is founded includes 6,786 acres of prior claims (exclusive of the above quantity of 85,600 acres) which, having a preference by law to the warrants and rights upon which this grant is founded, liberty is reserved that the same shall be firm and valid, and may be carried into grant or grants, and this grant shall be no bar, in law or equity, to the confirmation of the title or titles to the same, as before mentioned and reserved with its appurtenances; to have and to hold

the said tract or parcel of land, with its appurtenances, to the said Benjamin Martin (except as before excepted) and his heirs forever. In witness whereof the said Robert Brooke, Esquire, Governor of the Commonwealth of Virginia, hath hereunto set his hand and caused the lesser seal of the said commonwealth to be affixed, at Richmond, on the first day of January, in the year of our Lord, one thousand seven hundred and ninety-six, and of the Commonwealth its twentieth. Robert Brooke." (Pages 11-12.)

This is what is known as an inclusive grant. Surveys had been made in different parts of the State which included in their boundaries smaller tracts, reserved by the surveyor, and some doubts arose as to the authority of the Governor to grant patents in such cases. Consequently, on the 2d day of June, 1788, the Legislature of Virginia passed an act to authorize the Governor to issue them, the 1st section of which is as follows:

"That it shall and may be lawful for the Governor to issue grants with reservations of claims to lands included within such surveys, any thing in any law to the contrary nothwithstanding." (Ch. 58 Revised Code 1819, page 434.)

The defendant's title rests on a survey made for Albert Gallatin and Savary De Valcoulon for 2,000 acres of land, dated August 24, 1794. (Record, page 16.)

And a grant to said last mentioned parties from the Commonwealth of Virginia, for 2,000 acres of land dated 22d July, 1795. (Page 17.)

And the forfeiture and sale of the Gallatin title as delinquent and forfeited lands.

The Wilson survey and the Gallatin and Savary survey overlap each other to the extent of about 1,100 acres, as shown on the plat in the printed record on plat No. 4, page 14, and the land in controversy is a part of this 1,100 acres.

The grant to Gallatin and Savary is founded on an older survey than the survey on which the

Martin grant is founded, and is older than the Martin grant. But the Gallatin and Savacy grant became forfeited to the Commonwealth of Virginia on or before the 22d day of March, 1842, for the non-payment of taxes due thereon, and for the failure of the owners to cause the same to be entered on the books of the commissioners of the proper counties, and have the same charged with taxes according to law. (Page 18.)

And at the time of the passage of the act, herein after referred to, all taxes assessed against the Martin grant and all taxes that ought to have been assessed or charged thereon had been paid by the parties claiming under it.

The plaintiff located 8,000 acres of "prior claims" within the Wilson survey and outside of the Gallatin survey, as existing at the time the Wilson survey was made, and claims that the land embraced within the interlap between the Wilson and Gallatin surveys, does not constitute a "prior claim" reserved in the Martin grant.

That by virtue of the 3d section of the Act of the Legislature of Virginia, passed March 22d, 1842, which reads as follows:

That all right, title and interest which shall be vested in the Commonwealth in any lands lying west of the Alleghany Mountains, by reason of the non-payment of taxes heretofore due thereon, or which may become due on or before the first day of January next, or of the failure of the owner or owners thereof to cause the same to be entered on the books of the commissioners of the proper counties, and have the same charged with taxes according to law, by virtue of the provisions of the several acts of assembly heretofore enacted in reference to delinquent and omitted lands, shall be, and the same are hereby absolutely transferred to, and vested in any person or persons, (other than those for whose default the same may have been forfeited, their heirs and devisees,) for so much as such person or persons may have just title or claim to, legal or equitable, claimed, held, or derived from or under any grant of the Commonwealth, bearing date previous to the first day of January, eighteen hundred and forty-three, who shall have discharged all taxes duly assessed and charged against him or them upon such lands, and all taxes that ought to have been assessed or charged thereon, from the time he, she or they acquired title thereto, whether legal or equitable."

Acts of 1841-42, Chap. 13 page 18.

And by virtue, also, of the forfeiture of the Gallatin and Savary grant, that part of the Gallatin surve, enured to the benefit of the owners of the Martin grant for the reason that they had fully complied with the section above referred to, and that it was not land which had been reserved in the Martin grant.

That the grantee in the Martin grant had procured legal title from the Commonwealth of Virginia to all the land embraced therein except 6,786 acres; and that as to the land embraced within said overlap of the two surveys, he is secured with all the title that a junior grant on an elder grant could secure.

That under the admissions in, and the evidence of this case, whether or not the land in controversy in this action was a "prior claim" reserved in the Martin grant was a question of *fact* for the jury to decide.

The plaintiff prayed the following instruction, which was refused, and the defendants prayed the following which was given; and the plaintiff excepted to the decision of the court on each motion.

Upon this evidenee proved and admitted, the plaintiff therefore asked the court to charge the jury as follows:

"Inasmuch as it is a conceded fact in this cause that the Gallatin survey of 2,000 acres, which has been given in evidence by the defendants and under which they claim, was, at the date of the passage of the act of March 22d, 1842, concerning delinquent and forfeited lands, forfeited to the Commonwealth for the nonpayment of taxes due thereon, or for the failure of the owners to cause the same to be entered on the books of the commissioners of the proper counties and have the same charged with taxes according to law, that the said survey then was, by reason of such forfeiture, vested in the Commonwealth, and if the jury find from the evidence that the boundaries of the William Wilson survey of 85,600 acres and the grant thereunder given in evidence by the plaintiff and under which he claims included any part of the land embraced within the boundary of the said forfeited
72 survey, and that the persons having just title or claim to said Wilson survey at the passage of the act aforesaid shall have paid all the taxes duly assessed and charged against them, and all taxes that ought to have been assessed or charged thereon from the time they acquired title thereto, then by virtue of the said act of March 22d, 1842, that portion of the forfeited

survey embraced within the boundary of the Wilson survey, which had become and was vested in the Commonwealth, became absolutely transferred to and vested in the said persons having such title and claim to said Wilson survey, except so far as any persons under *bona fide* claim to any part of said land by title, legal or equitable, derived from the Commonwealth and on which the taxes had been fully paid up according to law."

To the giving of which instruction the defendants objected and in lieu thereof the court, at the instance of the defendants, instructed the jury as follows, to-wit:

"If the jury find from the evidence that the grant to Gallatin and Savary, under which defendant's claim, is older than the grant to Benjamin Martin, assignee of William Wilson,
73 under which the plaintiff claims, and that the Gallatin and Savary grant is founded on an older entry and survey than the entry and survey upon which the Martin grant is founded, and that every portion of the land in controversy is included within the calls of each of said grants, then the court instructs the jury that that portion of the Gallatin and Savary survey within the said Martin survey was excepted and reserved in and from the operation of the Martin grant, and that the grant to said Martin, assignee, &c., vested in him no title or claim of title to so much of the Gallatin and Savary grant as was included within the limits of the said Martin grant, and that the plaintiff has acquired no title or claim of title to the land in controversy in this suit by virtue of the forfeiture of the Gallatin and Savarry title to the Commonwealth of Virginia."

It was error to refuse the instructions asked for by the plaintiff.

It was error also to give the instruction asked for by the defendants.

The defendant's title rests also on a deed from the commissioner of delinquent and forfeited lands to Mary Jones. The plaintiff objected to the reading of this deed in evidence, "because the proceedings in Fayette county did not show Mary Jones to be the purchaser of the land described in the deed, and because the defendants produced no decree of court directing the deed to be made to her for the lands conveyed by said deed." The objections were overruled and the deed was read in evidenee, and the plaintiff excepted, &c.

The reading of said deed as evidence to the jury, was error Record, page 21.

The plaintiff, to maintain the issue on his part, put in evi-

dence with other evidence, admissions, agreements and evidence referred to in his bill of exceptions "No. 1," as follows:

Plat and survey for William Wilson for 85,600 acres of land, made April 14, 1795.

Grant from the Commonwealth of Virginia to Benjamin Martin, assignee of William Wilson, for 85,600 acress of land, dated 1st January, 1796.

By sundry deeds and wills, all the title acquired by Martin under said grant, and all that enured to it by the forfeiture of the Gallatin and Savary title for 2,000 acres, granted to them by the Commonwealth of Virginia, 22d July, 1795, to the extent of the land described in the plaintiff's declaration, became vested in the plaintiff before, and was owned by him at the time this action was brought.

And it was agreed that the Gallatin and Savary title to the 2,000 acres referred to, was, on or before the 22d day of March, 1842, forfeited to the State for the non-payment of taxes, &c. (Page 18.)

A survey for 3,000 acaes for Albert Gallatin and Savary, dated 3d August, 1794, situate on south-west side of Great Kanawha river, joining around, above and below a survey made for Morris and Donnally at the Great Kanawha Falls of said river—beginning at a "Lynn" opposite mouth of Gauley river, &c., on the Kanawha river, and running to a "Hickory," &c., and to a "Lynn," &c. (Page 24.)

And proved that the Martin grant calls for the southern boundary of this 3,000-acre survey.

A survey for 2,000 acres for Albert Gallatin and Savary, dated 28th August, 1794, situate on south-west side of the Great Kanawha river. (Page 26.)

And proved that this survey lies between the Martin grant and the Great Kanawha river, and that the southern boundary of this 2,000-acre survey runs through the beginning corner of said Martin grant at the "2 beeches" designated on the index map "No. 4."

A survey made for Andrew Reed and John Stewart, for

50,000 acres, completed 10th June, 1795, on an entry made 4th August, 1794. (Page 28.)

And proved that 1,500 or 2,000 acres of this survey lies within the Martin grant, on the south east end thereof. (Page 29.)

An entry made for Thomas Edgar, *4th March*, 1795, for 9,730 acres of land, lying below and adjoining the entry made for John Stewart and Andrew Reed.

Copy of survey made for Thomas Edgar, for 9,730 acres, completed April 20th, 1796. (Page 30)

And proved that 6,817 acres of this survey lies within the Martin grant, adjoining said Reed and Stewart survey, and that no part of said Reed and Stewart or Thomas Edgar surveys lies within the interlock caused by the overlapping of the Martin grant and the Gallatin and Savary grant of 2,000 acres laid down on said map "No 4."

And plaintiff introduced evidence tending to prove that he and those under whom he claims, had been in occupation of the land described in the declaration, by actual occupancy, since 1860, and proved due payment of the taxes assessed on the lands granted to Martin up to and including the year 1842. (Page 16)

And the defendants to maintain the issue on their part, read in evidence a copy of the survey for 2,000 acres, herein referred to, made 24th August, 1794. (Page 16.)

Also, a copy of grant from the State of Virginia to Albert Gallatin and Savary, for 2,000 acres, dated 22d July, 1795.

The defendants also read in evidence copies of proceedings covering the forfeiture of the Gallatin and Savary 2,000 acres in controversy. (Page 18.)

Also, a deed from Beckley, commissioner of delinquent and forfeited lands, to Mary Jones, dated 4th April, 1843.

To the reading of which deed the plaintiff objected, which

objection was overruled, and exception taken by the plaintiff.

Also a deed from Beckley, commissioner, to George Richards, dated 20th January, 1846.

And the defendants read in evidence sundry deeds and decrees, transferring and conveying to the defendants the title acquired by Mary Jones and George Richards, by the deeds from Beckley, commissioner, to the lands described in the two deeds last mentioned.

And it was admitted by the parties that the Wilson survey of 85,600 acres and the Gallatin and Savary survey of 2,000 acres, made 24th August, 1794, (under which defendants claim,) are correctly laid down on the plat made by A. P. Sinnett, marked "No. 4," and form an interlock, as there reported. (Page 15.)

It was also admitted, &c., that the lands claimed by the plaintiff, and described in his declaration, are represented and inscribed on said map within the lines shaded blue, as the "Forest Hill Tract," and that said lands are correctly laid down on said map. (Page16.)

It was also proved that the beginning corner in the Martin grant, for 85;600 acres, is described on said map by the index pointing to the corner marked "2 beeches." (Page 10.)

That the fourth call in said grant, for "2 chestnut trees growing from one root," is represented on the Martin line, within the Gallatin and Savary grant, at "2 chestnuts," which were found and located. And that the call in the Martin grant, "to a beech in the Forks of Armstrong's creek," corner to Albert Gallatin's survey of 2,000 acres, is represented on said map at the point "A."

The foregoing are the substantial points of the evidence and facts on which the instructions herein set out prayed for by the respective parties were based. See printed record p—.

The survey of 2,000 acres for Gallatin and Savary, made 28th August, 1794, and put in evidence by plaintiff, lies be-

tween the Wilson survey and the Kanawha river, and the southern boundary runs through the beginning corner of the Wilson survey at "2 beeches." (Page 26.)

See map of the Wilson survey.)

The first call for a Gallatin survey in the Wilson survey, after leaving beginning corner, is for a "beech" in the Forks of Armstrong's creek, "corner to Albert Gallatin survey of 2,000 acres," which survey interlaps with the Wilson survey, and with the exception of the part which interlaps, it lies between the Wilson survey and the Kanawha river.

The survey for the 3,000 acres for Albert Gallatin and Savary, &c., dated 3d August, 1794, lies above the 2,000-acre survey above mentioned, and between the Kanawha river and the Wilson survey, and the Wilson survey calls for the Gallatin survey at a "hickory," and runs with the Gallatin line to a "gum and maple," thence to "2 Spanish oaks." (See map and survey of Wilson survey, and map and survey of the 3,000 acres, on page 24.)

So it will be observed that with the exception of the interlock referred to, there is almost a coterminous line of Gallatin and Savary surveys lying between the Wilson survey and the Kanawha river, from the lower beginning corner at "2 beeches," to the upper corner of the Wilson survey above the Kanawha Falls, opposite the Gauley river.

Attention is called to the *general* description of the Wilson survey, as follows: "Eighty-five thousand, six hundred acres of land in Kanawha county, on the south-west side of Great Kanawha river, joining surveys made for Albert Gallatin & Co., at and near the Great Kanawha Falls of said river *extending down, back of, and with said surveys*," &c.

The same language is used in the grant to Martin, assignee of Wilson, in the *general* description of the Wilson survey, as above quoted. (Page 11.)

This evidence, I think, is sufficient to carry conviction that the allowance made by the surveyor of the Wilson survey of "6,786 acres of prior claims, for which there is an al-

lowance made in the calculation," is no part of the Gallatin and Savary grant for the 2,000 acres involved in this action, and that the interlock between the Wilson survey and the Gallatin and Savary survey was an accident and was not known by any one at the time it was made. (Page 27.)

The Reed and Stewart survey, for 50,000 acres, was based on an entry made on the *4th of August, 1794.*

The survey made for William Wilson, for 85,600 acres, was made on the 14th of April, 1795, and the last entry on which the Wilson survey was based was made on the 10th of April, 1795. (Page 24.)

The survey for Thomas Edgar, for 9,730 acres, was made on an entry made the *4th of March, 1795.* (Page 29.)

So that when the last entry on which the Wilson survey was made was entered, and when the said survey was made, the Reed and Stewart and Thomas Edgar surveys were "prior claims" and inchoate titles.

(Armstrong and Morrell, 11 Wallace, Page 120)

(Bryan and Willard, 21 West Virginia, page 65.)

And the plaintiff fully accounted for the 6,786 acres reserved and excepted from the calculation in the Martin grant by proof, showing that about 8,000 acres of "prior claims" (inchoate titles,) of the Reed and Stewart and Thomas Edgar surveys, lie within the Martin grant, on the north end thereof, which fact was not proven in the case of Bryan vs. Willard.

No part of the Reed and Stewart and Thomas Edgar surveys lies within the Gallatin and Savary grant of 22 July, 1795.

The defendant's title to the land involved in this action, was derived from the commissioner of delinquent and forfeited lands, under sales of said 2,000 acres, made under an order of the Circuit Superior Court of Law and Chancery for Fayette county, on April 2d, 1842. The sale was made June 16th, 1842, and the deed was made to those under whom de-

fendants claim on April 4th, 1843.

The plaintiff claims that when the Gallatin and Savary survey of 2,000 acres was forfeited, the forfeiture enured, to the extent of the interlock, to the owners of the Martin grant, for the reason that the owners of the Martin grant had proved the existence of every requisite preseribed in section 3, of Chapter 13, of the Acts of 1842, necessary to entitle him to the forfeited title.

The prerequisites were: 1st, just title derived from the Commonwealth, bearing date previous to 1st January, 1843; and 2d, the payment of all taxes on all lands embraced within the exterior lines of the Martin grant—except the 6,786 acres reserved, up to and including the year 1842. And this claim was put into an instruction asked for by him and refused by the court.

By reference to section 3 of the Act referred to, it will be seen, that the benefit of the forfeited title is transferred, "for so much as such person or persons may have just title or claim to, legal or equitable, claimed, held or derived from or under any grant of the Commonwealth, bearing date previous to the 1st day of January, 1843." The Martin grant excepts for such prior claims, 6,786 acres, and with the exception of this number of acres, Martin acquired legal title by his grant to the remaining part of the survey, to-wit: to 85,600 acres, which he paid for and which he and his grantees have paid the taxes thereon up to and including the year 1842.

The instruction asked for by the plaintiff is based on the idea that the land excepted in the Martin grant was a question of fact for the jury to decide, and that if it appeared from the evidence that the land in controversy was no part of the 6,786 acres reserved in the Martin grant, and that the persons having just title or claim to the Martin grant had fully complied with the requirements of the act of March 22, 1842, concerning delinquent and forfeited lands at the time of the passage of said act in order to get the benefit of the forfeiture of the Gallatin and Savary title, then the plaintiff was entitled to recover in the action.

The instruction asked for by the defendents and given by the court is based on the idea that the reservation in the Martin grant, though limited on its face to 6,786 acres, covered every prior title or claim that existed at the time of the execution of said grant without regard to quantity, and that therefore the persons having just title or claim to the Martin grant were not in position to take the benefit of the forfeiture of the Gallatin and Savary title for the land in controversy.

If the instruction given by the court be law, then if there had been other prior claims existing at the time of the execution of the Martin grant covering the entire Martin survey, the title of the Commonwealth to the 85,600 acres patented to Martin, or any part thereof, would not have passed to the patentee, and all would fall within the phrase, "But it is always to be understood that the survey upon which this grant is founded includes 6,786 acres of prior claims (exclusive of the above quantity of 85,600 acres") &c., and that Martin would not have taken title to this 85,600 acres or any part thereof as a junior patentee.

This is a fair and logical statement of the instruction given by the court.

In 1817, the Appellate Court of Virginia in the case of Hopkins and Ward, 6 Munf. 38, had the statute of June 2, 1788, in review. The plaintiff relied upon a grant to Samuel Hopkins, dated July 2, 1796, for 70,202 acres, founded upon a survey bearing date November 4, 1795; the grant containing a clause in these words: "But it is always to be understood that the survey, upon which this grant is founded, includes 42,000 acres (exclusive of the above quantity of 70,202 acres") &c.; the reservation throughout having the same form as the reservation in the grant to Martin, assignee of William Wilson, for 85,600 acres. The trial court was asked by the plaintiff to instruct the jury: "That all the land included within the lines mentioned in said patent, passed thereby to Samuel Hopkins except such part thereof as might

be held by prior claims; and that it was incumbent on the defendants to show that the lands claimed by them were held by surveys and entries made prior to the emination of said grant, and within the exception therein contained, or by patents issued previous to the said 2d of July 1796, or other paramount titles. But this instruction was refused, and the jury were informed that the plaintiff was only entitled under his patent to 70,202 acres, although it should appear that there were *no claims* for the 42,000 acres included by the patent, as the Commonwealth had only granted him 70,202 acres, part of the land within the lines mentioned in the patent; that the plaintiff by virtue of his patent, could claim no part of the 42,000 acres. But the Court of Appeals were of the opinion that under the terms of the patent, the grantee was entitled to all the land contained within the metes and bounds thereof, subject, however, to the reservations in said patent contained; and the Court of Appeals also decided that in the action before them the appellant Hopkins *was entitled to recover all of the land except such as the appellees might show themselves entitled to under the reservations aforesaid;* and therefore reversed the judgment of the court below. In this case the defendants were mere intruders without color of title, and did not attempt to show any prior claim; they maintained that whether there were such prior claims or not, no title to the 42,000 acres passed to the patentee, but was reserved in the Commonwealth, and being so reserved the plaintiff had no title and could not recover any part of the same. This construction of the clause of the reservation in the patent was rejected. This clause did not except 42,000 acres from the operation of the patent, but it did except prior claims, if any, to that quantity of acres. The effect of the decision was that if there were no prior claims the patentee was entitled to recover all the land embraced within the metes and bounds of his patent.

This decision was based upon the idea that whatever is included within the grant necessarily passes by it, except such portion as is capable of being identified as part of the reservation.

Carter vs. Hagen, 75 Va. 560.

It seems to me that the decision of the Supreme Court of Appeals in the case of Hopkins and Ward is direct authority against the position taken by the court in the instruction it gave to the jury on the trial of the case at bar now under consideration.

It is not material on whom rested the burden to show whether or not the land in controversy was or was not land excepted in the Martin grant, inasmuch as the defendeants did show that the land in controversy lied within said grant, and that it was also a part of an older grant and founded on an older survey than the survey on which the Martin grant was founded.

In 1826, the statute of June 2, 1788, came again before the Supreme Court of Appeals of Virginia in the case of Nichols vs. Covey, 4 Randolph 365. The patent including prior claims, contained reservation similar in terms to that in Hopkins vs. Ward. The special verdict found that an entry of a prior claim had been made which was withdrawn, and another entry to include the same land was made by one of the original prior claimants. It was held that the reservation in the inclusive patent did not pass to the patentee the title of the Commonwealth in and to the lands covered by such prior claims, subject only to the title of the prior claimant; but if the title is only a prior entry, and become vacated by neglect to survey and return the plat, any one may lay a warrant on the same as in other cases of vacant and unappropriated lands.

It seems that the two cases are reconcilable, if we observe that in Hopkins and Ward there was no showing that the claims of prior claimants were located within the bounds of the plaintiff's claim, or fell within the reservation in the patent; for of these facts the jury in their verdict say they were not satisfied. But in the case of Nichols and Covey the special verdict found that the prior claims carried into grant lay within the boundary of the grant issued to Nichols and

was the land in controversy. It is apparent, therefo re, why the learned judge in Nichols vs. Covey did not call attention to the ruling in Hopkins vs. Ward. Considered in the light of the circumstances of each case, they do not com e in conflict.

For if there is no title paramount to the inclusive grantees to all the land embraced within his patent, upon what principle is he compelled to do more than to locate the boundaries of his grant and against him who does not show a prior claim within the terms of the reservation capable of identification, why should not the inclusive patentees, upon the issue of title recover? This is the effect of the decision in Hopkins and Ward.

In the case of Bryan vs. Willard, 21 West Va. 71. the court seems to lay down a different rule by putting the burden on the inclusive patentee, to show that the defendent is occupying land granted to him (plaintiff) and is not of reserved land.

There is no difficulty in applying the proper rule where the prior claims are identified as lying within the inclusive survey; but without such identification who must take the burden of proving those limits? The rule is well settled that a conveyance by metes and bounds though expressing a certain number of acres gives the grantee all the land within the lines of his deed, unless the reservation is defin ite or capable of being made certain.

Why should a different rule prevail where the grant is from the Commonwealth, and the question arises between hostile claimants?

The existence and location of the prior entry and survey is peculiarly within the knowledge of him who claims under it, not within the knowledge of him whose claim is *prima facie* fixed and established in the absence of evidence to the contrary. Greenlief vs. Berth 6 Peters 302.

The suggestion that the inclusive patentees ought not to

get any more land than is expressed in the number of acres in his patent, minus the prior claims reserved, because he did not pay for any excess, although his grant specifies certain defined boundaries, was first made in Nichols vs. Covey. But it is contrary to the construction given to all other grants, unless in a controversy where the question involves a sale in gross or by the acre. In the case of Bryan vs. Willard, 21 W. Va. the court seems to adopt the suggestion above referred to, made in the case of Nichols vs. Covey. It says: "In the more recent cases, the doctrine seems to be that in as much as the grantee of an inclusive grant acquired by the terms of his grant and the law, no title whatever to the land therein reserved and excepted for prior claims, such grantee or those claiming under him, ought not in ejectment to recover any more land than the *quantity granted to him; that being all he purchased and paid for.*"

It is not material to the plaintiff in the case under consideration whether the court adopt the rule laid down in Hopkins and Ward, or the "suggestion" above referred to, made in the case of Nichols and Covey and apparently adopted by the court in Bryan and Willard for both these cases decide that the title of the Commonwealth passes to the inclusive patentee to all the land which the patentee purchased by his grant. As to lands previously granted, lying within the bounds of the Wilson survey, but not reserved as excepted lands, the Hopkins grant secures to the patentee the same title to the land that a junior patent located on an elder patent would secure. It follows that the land excepted in the Martin grant must be confined to the number of acres therein reserved, to-wit: "6,786 acres."

I admit that after the defendents had located their claim within the Wilson survey as the land in controversy and based on a prior title, it then became incumbent on the plaintiff to show to the satisfaction of the jury that the tract claimed by the defendents was not within the bounds of the excluded claims.

Kenna vs. Quarrier, 3 W. Va. 210.

Bryan vs. Willard, 21 W. Va. 71.
Armstrong vs. Morrow, 14 Wall 143.
Carter vs. Hagan, 75 Va. 560.

It is very probable, at least, if the evidence had been submitted to the jury without the instruction given by the court and complained of by the plaintiff, the jury would have found that the land in controversy, is not land excluded from the operation of the Martin grant. But the instruction took the question from the jury and left them no discretion.

We maintain that land excepted in grants, made under the act of June 2, 1788, depends upon the way it is described; that if it be specifically described by metes and bounds, or by name so as to leave no doubt as to the land reserved, then it is a question of law for the court. But if the land excepted be for a specified number of acres, reserved, generally and not defined in the grant—without name or location, like the one under consideration, and the plaintiff affirmatively accounts for the "prior claims," and locates them within the bounds of his grant outside of the grant under which the defendents claim, then the identification of the excepted land is a question of fact for the jury to decide from all the facts and circumstances in the case

Patrick vs. Donnally, 10 W. Va. p. 416.
Bryan vs. Willard, 21 W. Va.

In the case of Bryan and Willard, the plaintiff rested on the idea, that after he had located the exterior boundaries of the Wilson survey and had shown that that survey included the land in controversy, the burden was on the defendents, who claimed that the Gallatin survey was reserved and excepted to prove that the Gallatin survey was in fact excepted. But it was admitted that the Gallatin survey was older than the Wilson and that 1100 acres of the Gallatin survey lied within the Wilson survey, a part of which was the land in controversy. On this state of facts, there was no error in the instruction given by the court on the trial of that cause.

In the decision of that case, the Supreme Court announces very positively the facts as follows:

"The principle announced in these authorities, I think, fully dispose of the case at bar. The facts show that the Gallatin entry, survey and grant were prior in time each to the entry, survey and grant of the Wilson, and that a portion of the lands embraced in the Gallatin, grant the one thousand one hun dred acres in controversy, lie within the exterior boundaries of the Wilson survey. *The Wilson expressly excepts from its grant six thousand, seven hundred and eighty-six acres for prior claims*, and there is no evidence whatever that this one thousand one hundred acres is not excepted, *nor that there are any other prior claims within said survey*." Page 73.

It is quite evident from the decision of the Court of Appeals in the case of Bryan vs. Willard, that if the admissions and evidence had been the same in that case as the record shows were before the trial court in this case, the trial court would have been reversed on the instruction which it gave to the jury.

If, as a matter of fact, the Gallatin survey was no part of the "6,786 acres" and those claiming under the Martin grant had "just claim" to the 1100 acres then they were in a position to take the benefit of the forfeited title. The greater part of West Virginia was covered with these elder grants, and occupants under junior grants have been sedulously protected and where the elder grants have been forfeited for non-payment of taxes and non-entry, the law casts the forfeited title on the junior grant, without inquisition or judicial proceedings of any kind.

Wild's Lessee vs. Serpell 10 Gratt. 405.

The Commonwealth granted to Benjamin Martin 85,600 acres of land and received pay for the same. If the Commonwealth parted with her title to any part of this land (not excepted) and has since acquired title to such land by forfeit-

ure or otherwise, it is but justice and equity that such title should enure to the benefit of the owners of the Martin grant. The same equitable rule should apply to the Commonwealth which applies to individuals in making such conveyances. All of which is respectfully submitted.

JOHN HALSTED.

By ABRAM BURLEW, *Attorney.*

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
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SUPREME COURT

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vs.

SARAH A. BUSTER, ET. ALS., *Defendants Below and Defendants in Error,*

BRIEF OF COUNSEL OF DEFENDANTS IN ERROR.

The Kanawha Gazette Print, Charleston, W. Va.

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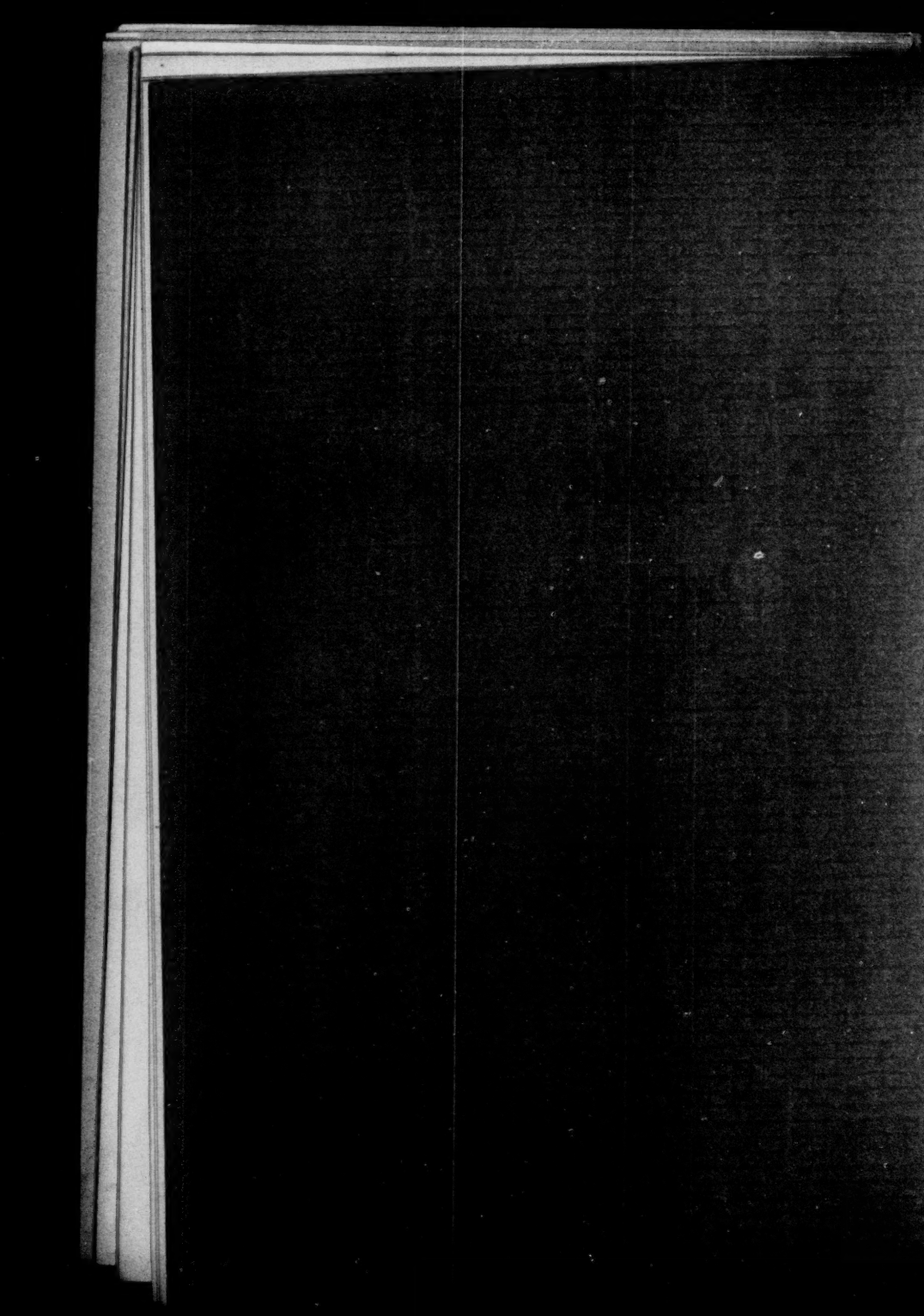

SUPREME COURT

OF THE

UNITED STATES.

JOHN HALSTEAD, *Plaintiff Below and Plaintiff in Error*

vs.

SARAH A. BUSTER, ET. ALS., *Defendants Below and Defendants in Error,*

BRIEF OF COUNSEL OF DEFENDANTS IN ERROR.

This writ of error was obtained by the plaintiff here, and plantiff below from a judgment rendered by the District Court of the United States for the District of West Virginia, in favor of the defendants here in an action of ejectment lately pending in said District Court.

The plaintiff in error claimed under what is known as the Wilson survey. or grant, of 85 600 acres, and the defendant under what is known and described as the Albert Gallatin and Savary de Valcoulon grant of 2,000 acres.

The Gallatin survey was founded on an entry made April 12th, 1785, (see printed record, page 24,) and survey of same made the 24th August, 1794, (see printed record, p. 16,) The patent issued upon the said survey on the 22nd day of July, 1795.

Its location and boundaries are admitted to be as shown upon plat exhibit "B" (printed record, p. 14.)

The Wilson or Martin grant is founded upon entries made the 24th day of October, 1794, and the 25th day of January, 1795, and a survey made in pursuance of said entries on the 14th day of April, 1795. The patent issued on the 1st day of January, 1796, and its location and the boundaries thereof, are admitted to be as shown on the said plat Exhibit 'B."

The Wilson survey and grant included within its exterior boundaries a part of the Gallatin survey and grant, to-wit: The triangle formed by the line extending north 49½° west from a point on Armstrong creek and marked on said Exhibit "B" "Back line of the Gallatin survey of 2,000 acres," and the line extending from the same point north 22° west, marked on plat "Line of the Wilson survey" to point marked "Double chestnut."

The plaintiff in error claimed title to the tract marked on said plat "Forest Hill tract 2,000 acres, shaded in blue under the Wilson grant" And the defendants in error claimed under the Gallatin survey and grant, such portion of the aforesaid 2,000 acres tract as lies within the red lines marked "W. B. Buster."

The Gallatin survey and grant, as will be observed from the foregoing dates, is older and superior in date of entry and survey to the Wilson or Martin grant.

For non-payment of taxes assessed against the Gallatin, subsequently to the date of the Wilson grant, it is admitted the Gallatin title became forfeited to the commonwealth of Virginia, and in 18—, the title required by the said Commonwealth under said forfeiture, was sold by the Commissioner of Forfeited Lands to the grantors of the defendants.

The plaintiff in error claimed at the trial that the purchasers at the sale made by the said commissioner, acquired no title to that portion of the Gallatin survey included within the boundaries of the Wilson survey; but that the forfeited title to such part of the Gallatin as the Wilson included, vested in the owners of the Wilson survey, and had passed down to the plaintiff. His claim was founded on the 3rd section of an act of the General Assembly of Virginia, passed on the 22nd day of March, 1842, which is as follows:

"3. *And be it further enacted,* That all right, title and in-

terest, which shall be vested in the Commonwealth in any lands or lots lying West of the Allegheny mountains, by reason of the non-payment of the taxes heretofore due thereon, or which may become due on or before the first day of January next, or of the failure of the owner or owners thereof to cause the same to be entered on the books of the Commissioner of the proper counties, and have the same charged with taxes aecording to law, by virtue of the provisions of the several acts of Assembly heretofore enacted in reference to delinquent and omitted lands shall be, and the same are hereby absolutely transferred to, and vested in any person or persons, (other than those for whose default the same may have been forfeited, their heirs or devisees) for so much as such person or persons may have just title or claim to, legal or equitable, claimed, held or derived from or under any grant of the Commonwealth bearing date previous to the 1st day of January, 1843, who shall have discharged all taxes duly assessed and charged against him or them upon such lands and all taxes as that ought to have been assessed or charged thereon, from the time he, she or they acquired title thereto, whether legal or equitable: *Provided*, That nothing in this section contained shall be construed to impair the right or title of any person or or persons who shall *bona fide* claim said land by title, legal or equitable, derived from the Commonwealth, on which the taxes have been fully paid up according to law, but in all such cases the parties shall be left to the strength of their titles respectively."

And the plaintiff, in view of his said claim under said statute, prayed the Court to give to the jury an instruction as follows, to-wit:

"The Court instructs the jury, inasmuch as it is a conceded fact in this cause that the Gallatin survey of 2,000 acres which has been given in evidence by the defendants, and under which they claim was, at the date of the passage of the act of March 22d, 1842, concerning delinquent and forfeited lands, forfeited to the Commonwealth for the non-payment of taxes due thereon or for the failure of the owners to cause the same to be entered on the books of the commissioners of the proper counties and have the same charged with taxes according to law, that the said survey then was, by reason of such forfeiture, vested in the Commonwealth, and if the jury find from the evidence that the boundaries of the William *William* [Wilson] survey of 85,600 acres and the grant thereunder given in evidence by the plaintiff and under which he claims included any part of the land embraced within the boundary of the said forfeited survey, and that the persons having just title or claim to said Wilson

survey at the passage of the act aforesaid shall have paid all the taxes duly assessed and charged against them, and all taxes that ought to have been assessed or charged thereon from the time they acquired title thereto, then by virtue of the said act of March 22d, 1842, that portion of the forfeited survey embraced within the boundary of the Wilson survey, which has become and was vested in the Commonwealth, became absolutely transferred to and vested in the said persons having such title and claim to said Wilson survey, except so far as any persons under *bona fide* claim to any part of said land by title, legal or equitable derived from the Commonwealth and on which the taxes have been fully paid up according to law."

Which the Court declined to give, but in lieu thereof, at the instance of the defendants gave to the jury the following instruction, to-wit:

"If the jury find from the evidence that the grant to Gallatin and Savary under which defendants claim, is older than the grant to Benjamin Martin assignee of William Wilson, under which the plaintiff claims, and that the Gallatin and Savary grant is founded on an older entry and survey than the entry and survey upon which the Martin grant is founded, and that any portion of the land in controversy is included within the calls of each of said grants, then the Court instructs the jury that that portion of the Gallatin and Savary survey within the said Martin survey was excepted and reserved in and from the operation of the Martin grant, and that the grant to said Martin, assignee, &c., vested in him no title or claim of title to so much of the Gallatin and Savary grant as was included within the limits of the said Martin grant, and that the plaintiff has acquired no title or claim of title to the land in controversy in this suit by virtue of the forfeiture of the Gallatin and Savary title to the Commonwealth of Virginia."

The refusal of the Court to give the instructions prayed for by the plaintiff, and its action in giving the instruction asked by the defendants, is in fact the main error assigned in the cause. Under said Act the junior claimant, under a grant, was not entitled to take the benefit of a forfeiture, unless he had *just title* or *claim* to the forfeited land, legal or equitable, claimed, held or derived from or under a grant of the Commonwealth, and the plaintiff in error, upon the theory that his grant gave him such just title or claim to that portion of the Gallatin survey included within the exterior boundaries of his grant, asked the instruction aforesaid.

While the defendants maintained, that such part of the Gal-

latin survey as was included within said exterior boundaries was neither granted nor intended to be granted by the Wilson or Martin grant; but that such portion was absolutely, by the terms of the said Martin grant, as well a matter of law, excepted and reserved from the Wilson or Martin grant and the plaintiff in error had no just title or claim whatever under said grant for such portion, and that on the forfeiture of the Gallatin survey, the title of the entire Gallatin survey, including that part within the exterior boundaries of the Wilson or Martin grant, vested absolutely in the Commonwealth and the party, acquiring title from the Commonwealth after such forfeiture through such sale, obtained such absolute title from the Commonwealth, and it was upon this theory that the defendants in error asked for the instruction which was given by the Court.

The Martin grant is what is known in the land law of Virginia and West Virginia and also in Kentucky, as an "Inclusive grant." Such grants were first authorized by the act of the General Assembly of Virginia, passed on the 2nd day of June, 1788. 2 Rev. Code Va., 434, which is as follows:

> "Whereas, sundry surveys have been made in different parts of this Commonwealth, which include in the general courses thereof, sundry smaller tracts of prior claimants, and which in the certificates granted by the surveyors of the respective counties are reserved to such claimants; and the Governor or Chief Magistrate is not authorized by law to issue grants upon such certificates of surveys; for remedy whereof.
>
> "1. Be it enacted by the General Assembly, that it shall and may be lawful for the Governor to issue grants with reservations of claims to lands included within such survey, anything in any law to the contrary notwithstanding."

The Martin grant so issued under said statute contained a reservation of the lands of prior claimants as provided in said act. [See pages 10, 11 and 12, Printed Record.]

And it is insisted that the law is now well settled in the States of Virginia, West Virginia and Kentucky, and by this court in cases founded on grants issued under this statute, that all older entries, surveys and grants included in whole, or in part within the exterior boundaries of such grants were reserved and excepted therefrom, as fully as if such older entries, surveys and grants had been entirely without the exterior boundaries of such younger "inclusive" grants, and the

grantees in the latter took no title, or claim of title, under their claim to such included entries, surveys, or grants.

And moreover as a matter of fact it plainly appears from the grant to Martin, that the Gallatin survey was not included in the land granted to said Martin, although parts of the "Gallatin" may have been within Martin's lines.

The following language is used in said grant :

"There is granted by the said Commonwealth unto Benjamin Martin, assignee of William Wilson, a certain tract or parcel of land containing 85,600 acres by survey bearing date the 14th day of April, 1795, lying and being in the county of Kanawha, on the southwest side of the Great Kanawha River, *joining surveys made for Albert Gallatin at and near the Great Falls of said river and extending down, back of, and with the said surveys so as to include some of the waters of Cabin Creek, &c.*"

The Gallatin Surveys were also excluded in the entry on which the Martin grant issued. (See printed recordpage 23).

Also in the survey, (printed record, page 9).

This statute, and the effect of the grants under it, have been repeatedly before the highest Courts of Virginia, West Virginia, and Kentucky, as well as the Supreme Court of United States. See

Hopkins vs. Ward, 6 Munf. (Va.) 40.
Nichols vs. Covey, 4 Rand (Va.) 387.
Trotter vs. Newton, 30 Gratt (Va.) 582-9.
Patrick vs. Dryden 10 W. Va. 387.
Bryan vs. Willard 21 W. Va. 65.
Madison vs. Owens, 6 Litt. Select Cas. 281 (Ky.)
Scott vs. Ratcliff 5 Peters 81.
Armstrong vs. Morrill 14 Wall. 143.

And the law of the case as set forth in the defendant's instruction, has in each case been distinctly declared and announced.

This question was last before the Supreme Court of the United States in the above cited case of Armstrong vs. Morrill, (14 Wall. 143), which case was on a writ of error from the same court as this, and the conclusion of the court there in is set forth in Syllabus 4 of the points decided in said case, which is as follows:

4. "Under the Virginia act of June 2d, 1788, the Governor may issue grants of land with reservations of claims to

land included in the survey, which grants pass no legal title to the lands excepted from the grants."

The case cited of Bryan vs. Willard (21 W. Va. 65) contains the latest adjudication of the Supreme Court of Appeals of West Virginia on this question, and the Court will observe from the reading of the case that it is as to law and facts the same as the case involved in this writ of error. The plaintiff Bryan claiming under this same Wilson or Martin grant—the defendant Willard under the Gallatin, by virtue of the same sale made by the Commissioner of delinquent or forfeited lands, as in this case and the land in controversy being a portion of said Gallatin survey situated within the same triangle—being in fact near the "Double Chestnut" marked on the plat; and the instructions asked in that case are in substance identical with those asked in the case at bar. The trial Court there refused the plaintiff's instruction and gave the defendant's instructions as the court did in this case, and the Supreme Court of West Virginia approved the action of the trial court.

Under the Constitution of West Virginia its Supreme Court is required to prepare a Syllabus of the points adjudicated in each case concurred in by three of the Judges thereof, which is to be prefixed to the published report of the case. The syllabus prepared by the court under this provision in this case of Bryan vs. Willard, is as follows:

"1. Under the Act of June, 1788, authorizing the Governor to issue grants with reservation of prior claims included within the boundaries thereof, the reservations in such grants under said Act exclude from their operation all lands held by prior claimants at the dates of the surveys on which such grants are founded, within the exterior boundaries of the grants—whether the title was only inchoate or had been perfected by grants (p. 72).

"2. Under an inclusive grant issued by virtue of said Act containing a general reservation of a specified quantity of land for prior claimants the grantee acquires no title whatever to the land so reserved. And in such case if the title of any such prior claimant becomes forfeited for non-entry or for the non-payment of taxes; the title thus forfeited will not vest in such inclusive grantee under the Act of March 22nd, 1842 (p. 74)."

The opinion of the Court in that case, fully and completely covers the question in the case at bar.

It is further insisted in the brief of counsel for the plaintiff

in error that the question as to whether the Gallatin survey was excluded from the lands granted to Martin, was not one of law to be determined by he Court, but one of fact to be determined by the jury, and that the instruction of the Court is therefore erroneous.

The Court in its instruction submitted certain questions of fact as to which there was really no controversy, to the jury, and instructed the jury if they found those facts in a certain way, then the law was as set forth in said instruction. The matter of law settled by the instruction was as to the legal effect of an act of the General Assembly, and a grant issued thereunder, which was a proper matter to be determined by the Court and not by the jury.

It was not error to admit in evidence the deed from Beckley, commissioner, to Mary Jones.

From the decree (on pages 18 and 19 of printed record) it appears that Beckley, commissioner, made a report to the circuit superior court of law and chancery for Fayette county of the sale made by him of the 2,000 acres Gallatin survey, and the decree founded on such report finds the fact that the purchase thereof was made by James Morris for himself and others. Who such others were does not appear from the decree, but doubtless did appear from said report. It was not then in Virginia and is not now in West Virginia the practice to copy such reports in the order books, yet such report became a part of the record of the proceeding and frequently to ascertain who were purchasers of lands at judicial sales resort, must be had to such reports. The commissioner having made a deed to Mary Jones as purchaser of one of the lots, it can well be presumed that the report showed her to be one of such purchasers. The fact that no order was produced directing the making of the deed, was not a valid objection to the admission of the deed in evidence. It was shown that the record book of the court was lost or destroyed during the late war, and if such order was necessary, the presumption would be that the commissioner made said deed in pursuance of authority.

The commissioner who made the deed was the same who made the sale.

The 9th section of the Act passed by the General Assembly of Virginia on the 15th day of March, 1838, authorized the making of said deed without any order of court.

Said section is as follows:

"Be it further enacted, that upon the payment of all of the purchase money by the purchaser, it shall be lawful for the commissioner to receive the same, first deducting the interest thereon at the rate of six per centum per annum from the time the same shall be paid until the time when the same will become due and payable by the terms of the sale and thereupon the purchaser shall be entitled to his deed for the land so purchased and paid for, upon application to said commissioner but without warranty."

Hutchinson's Land Titles, section 190.

Miller vs. Williams and others, 15 Gratt. 224.

But euen if the said deed was improperly admitted in evidence, yet that fact would have no material bearing upon this case, as the action of ejectment in West Virginia is not a comparison of titles, but such action may be defeated by showing a better outstanding title in any other person, or in the State, and the result would be that if the defendants had not acquired the legal title by a conveyance properly authorized, such title by reason of the said forfeiture of the Gallatin survey, would be still vested in the State, and this would defeat the plaintiffs' action.

Hutchinson's Land Titles, section 470.

Bradley et al vs. Ewart et al 18 W. Va., page 598.

All of which is respectfully submitted,

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W. MOLLOHAN,
Of Counsel for Defendants in Error.